Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

MICHAEL L. BARNES

Petitioner,

VS.

KAREN JOHNSON, Individually and as Dean of Students, St. Mary's University; ANDREW HILL, Individually and as Assistant Dean of Students, St. Mary's University; PAUL CHAPA, Individually and as Sergeant, St. Mary's University Campus Police; and ST. MARY'S UNIVERSITY, A Private Religious Educational Institution Organized Under The Laws Of Texas

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for
The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether probable cause for a warrantless arrest exists where a private party arresting officer bases the arrest on the ambiguous terms of a trespass warning issued by his private party employer.

b. Whether private party police officer is entitled to qualified immunity for claims arising out of such warrantless arrest.

2. Whether the existence of probable cause for a warrantless arrest in the context of a civil rights claim under 42 U.S.C. §1983 is a jury question or must be determined by the court on motion for summary judgment.

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. 4, *infra*) is unreported. The opinion of the district court (App. 2, *infra*) as well as original Report and Recommendations of the Magistrate Judge (App. 1, *infra*) are also unreported.

JURISDICTION

This case was filed in the district court under 42 U.S.C. §1983 and the Fourth Amendment to the United States Constitution invoking the court's federal question jurisdiction; and 28 U.S.C. §§1331, 1343 and 1367 which provide for federal court supplemental jurisdiction over issues of state law. The appeal to the Fifth Circuit court was pursuant to 28 U.S.C. §636 (a) et seq., and 28 U.S.C. §1291. The court of appeals affirmed the district court in an opinion entered on May 20, 2004. (App. 4). A timely petition for panel rehearing was denied on June 17, 2004. (App. 5); and

Judgment was entered on June 25, 2004. (App. 6). The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. The Fourth Amendment to the Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. 42 U.S.C. §1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

In September of 1999 petitioner was a second-year law student at St. Mary's University in San Antonio, Texas when a female law student filed a complaint against him alleging that petitioner had stalked her. The complaint was received by the university's dean of students, respondent Karen Johnson. Petitioner was charged with stalking / harassment, failure to truthfully identify himself to police, and failure to achieve the Christian goal – all violations of the student honor code. (App. 7). Petitioner was notified of the filing of the complaint; and a university judicial tribunal was instituted in November, 1999 to hear and to try the charges in the complaint. Petitioner did not attend the hearing in the case. The judicial tribunal found petitioner not guilty of the stalking charge; but found him guilty of the other two charges. After the conclusion of the hearing, the dean of students imposed a sanction of a one semester suspension which was scheduled to end on May 20, 2000. (App. 7). After exhausting all of his appeals within the university, petitioner was formally suspended on January 31, 2000. In connection with this formal suspension, the university issued to petitioner a 'trespass warning citation'. (App. 8).

On May 2, 2000 as the end of his suspension approached, petitioner wrote a letter to the dean of students in order to initiate the process of formal return to the university. In a reply letter dated May 9, 2000 the dean informed petitioner that before he could be readmitted, he would have to attend counseling sessions. On May 17, 2000 petitioner telephoned the dean of students. Petitioner verbally protested the counseling requirement, complaining that this counseling requirement was a new and previously undisclosed pre-condition to his readmission; and that in any case he, petitioner, had already presented himself for the on-campus counseling session ordered in his original notice of

suspension. Petitioner insisted that the dean of students already had more than enough information on which to base any decision on readmission; and petitioner insisted that the dean of students take action on his application for readmission. Respondent replied '*I can do that.*'

When no decision letter from respondent had arrived at his Houston home by the start of registration for summer classes, petitioner drove from Houston to San Antonio on the morning of May 25, 2000. He arrived at the law school campus at about 11:00 a.m., and went directly to the law school administration building where he perused the listing of courses for the summer session. After a few brief moments there, petitioner walked across the sidewalk to the Raba Building which housed the law school financial aid office. While in the financial aid office, two university police cruisers arrived near the financial aid office. Two St. Mary's University campus police officers entered the building accompanied by respondent Andrew Hill, assistant dean of students. They motioned for petitioner to step out into the lobby of the building and speak to the officers. One of the officers, respondent Paul Chapa asked petitioner why he was on campus. Petitioner responded that he had come to register for summer classes and to inquire about financial aid for the summer. Officer Chapa asked if petitioner was aware that he was suspended from campus. Petitioner responded that the suspension had expired the previous week on the 20th of May.

At that moment respondent Johnson, the dean of students, arrived in the lobby of the Raba Building. When Officer Chapa related to Dean Johnson petitioner's statement that the suspension had expired the previous week, Johnson stated that such was not the case. Johnson then asked petitioner '*Didn't you get my letter*?' Petitioner replied '*What letter*?' Johnson then said '*I'll go and get you a copy*'. At that point respondent Johnson turned and left the building.

Immediately thereafter, Officer Chapa placed petitioner under arrest, advised him that he was being charged with criminal trespass, and transported him to the campus police station. While petitioner remained handcuffed in the back seat of the police cruiser, Officer Chapa went inside the campus police station. Chapa returned a few moments later and showed petitioner a copy of a letter dated May 20, 2000 from Karen Johnson to Michael Barnes. (App. 9). Prior to that moment, petitioner had never seen and had no knowledge of the letter. Petitioner was transported downtown to the San Antonio police department and then to the Bexar County Jail where he was processed and placed in a cell. At approximately 3:00 a.m. the next day petitioner's wife arrived from Houston and bonded petitioner out of jail.

On the March 15, 2001 trial date for the criminal trespass charge, with petitioner present in the courtroom, the charges were dismissed by a Bexar County state district judge. On March 14, 2002 petitioner filed this suit in federal district court in San Antonio, Texas.

SUMMARY OF PETITIONER'S ARGUMENT

1. Petitioner's arrest was executed with a complete absence of probable cause. The hallmark criterion for a valid warrantless arrest under the Fourth Amendment is reasonableness. In a situation where petitioner in fact committed no act of trespass, and the arresting officer failed to verify the basis for the arrest in a circumstance where the dubious legitimacy of the arrest was made known to the officer; and where it would have occasioned no additional burden on him to do so, the failure to inquire into the legitimacy of the arrest is *per se* unreasonable – regardless of assertions of 'subjective good faith' - and fatally deficient in constitutional terms. Such willful indifference to pertinent facts surrounding the arrest vitiates any claim by the officer of the objective good-faith which must inhere in the probable

cause for a warrantless arrest. The trial court's grant of summary judgment ignored the 'totality of circumstances' standard of review for probable cause.

2. The question of determining probable cause in the context of a claim under Section 1983 is a routine fact question which ordinarily and unremarkably should be submitted to the jury. In the criminal context, notions of interfering and second-guessing police in the stressful and dangerous business of investigating and ferreting out crime argue for a deferential approach to examining the decision to arrest. But this same deference is wholly unwarranted in a section 1983 proceeding where the criminal charge has been resolved previously in favor of the plaintiff - and the focus is now on the alleged deprivation and violation of plaintiff's substantive constitutional protections by the arresting officer. Probable cause in the context of a *criminal* arrest and prosecution can be decided summarily by the court, in equal parts as a matter of public policy as much as a matter of law. But once the issue of criminal culpability has been resolved in favor of the plaintiff / arrestee, the question of reviewing probable cause and the justification and reasonableness of the initial arrest become classic questions of fact; and should be presented to the jury. This is particularly the case where the adverse parties dispute literally every material fact in the case.

3. Qualified immunity is available to public officials who commit torts in the exercise of their official duties only when such torts are not violations of clearly established rights. Respondents herein are not entitled to qualified immunity for two reasons. First, none of the respondents are public officials: they are all privately employed by a private, sectarian university. Private parties occupy no office requiring them to exercise discretion; suits against these parties do not impede the efficient functioning of government, nor do they dissuade able persons from

government service. The protections accorded public officials are simply not available to private actors in this present context; and no valid policy argument exists for the extension of a qualified immunity defense to these private persons. Second, the 'contours' of the Fourth Amendment right to be free from unreasonable and unjustified arrest were at all times herein a 'clearly established' constitutional right of which the arresting officer and, by extension, his administrative supervisors at the university reasonably would and should have been aware. Thus, private party §1983 defendants are entitled only to a good-faith *defense to suit* rather than a qualified *immunity from suit*. And in any event, the question of qualified immunity can be resolved on summary judgment only if the plaintiff cannot come forward with facts from which bad faith can be inferred. Because the issues of reasonableness, bad faith and malice are factual ones, the plaintiff can rely on circumstantial rather than direct evidence to make his case. Further, because the arrest was the result of university policy as embodied in the authority of the university's dean of students, all of the respondents in this case are vicariously liable for petitioner's damages.

4. Even after Albright v. Oliver, the federal circuit courts are split over the viability of a malicious prosecution cause of action under 42 U.S.C. §1983. The Fifth Circuit held – in a decision handed down during the pendency of petitioner's appeal - that no such cause of action exists; but other circuit courts have continued to find that causes of action for false arrest and malicious prosecution are available both under the Fourth Amendment and under section 1983. Petitioner's complaint articulated a constitutional cause of action under the Fourth Amendment, as well as a federal statutory claim through section 1983. In pleading his causes of action in the case, petitioner was entitled to rely on the circuit precedent which controlled at the time he filed suit. A circuit split over a fundamental question of access to the federal courts - the

historic guarantor of constitutional civil liberties - is an untenable anomaly in the area of search and seizure and the protections for constitutional civil liberties and citizen rights. Due to the recurring nature of complaints of overreaching and constitutionally unjustified arrests and seizures by police and law enforcement officials, the Court should address and resolve the conflict.

REASONS FOR GRANTING THE PETITION

I. The Courts Below Erroneously Held That Probable Cause Existed For Petitioner's Arrest.

A. The Courts Below Ignored The 'Totality of Circumstances' Standard for Determining the Presence of Probable Cause

The Magistrate Judge found that the arresting officer, respondent Paul Chapa, had probable cause for the arrest. (App. 1 at 22-29). The magistrate's findings ignored the totality of the circumstances and facts surrounding petitioner's arrest; and indulged inappropriate presumptions regarding Officer Chapa's deposition testimony. Chapa testified that he either "had" or "knew" about the trespass warning citation which was the basis of the probable cause finding. (Deposition of Paul Chapa at 25-26; 47-48). But defendants can take no sanctuary in the narrow terms of the trespass warning. Recall that the university drafted the warning citation; just as it had drafted petitioner's sanctions letter. Any ambiguity, contradiction or presumption arising between these two documents must be resolved against the party who drafted them. The university cannot issue contradictory edicts under its authority; and then hide behind the patent ambiguity in those documents and claim probable cause for arrest based on the existence of the trespass warning alone. This is not a case where private individuals are struggling to divine the inscrutable meaning of

legislation, ordinance or statute. The trespass warning citation qualifies as none of these. In assessing the reasonableness of any arrest executed under the auspices of the university's private dictate – whether the officer acted in subjective good faith or not – the validity of the instrument itself must first be scrutinized in context with the knowledge of those who summoned the arresting officer to the scene.

In his deposition testimony, Chapa clung tenaciously to the assertion that he relied '*solely*' on the trespass warning; when in fact petitioner's arrest was based on rumor, speculation and personal animus. It is a familiar and long-recognized phenomenon in Fourth Amendment cases:

> " [T]he policeman perceives ... the need to be able to reconstruct a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to appellate court standards. In this way, as one district attorney expressed it, 'the policeman fabricates probable cause.' By saying this, he did not mean to assert that the policeman is a liar, but rather that he finds it necessary to construct an *ex post facto* description of the proceeding events so that these conform to legal arrest requirements, whether in fact the events actually did so or not at the time of the arrest. Thus, the policeman respects the necessity for 'complying' with the arrest laws. His 'compliance', however, may take the form of '*post hoc*' manipulation of the facts rather than before-the-fact behavior." JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 214-215 (1966).

And this post hoc manipulation of facts was demonstrated in defendants' motion for summary judgment. At pages 7 and 8 of their motion for summary judgment defendants highlight the written narrative police report of Officer Chapa drafted in the immediate aftermath of

petitioner's arrest. In that report, Chapa cites the '*letter from the Dean of Students in reference to the criminal trespass warning*' as support for his assertion of probable cause for the arrest. (Exhibit 23 to Plaintiff's Supplemental Opposition to Summary Judgment). But recall that Chapa testified at his subsequent deposition that at the time of the arrest, he knew nothing about the existence of the May 20th letter; and that in any case, it would have made no difference to him in his decision to arrest petitioner. (Deposition of Paul Chapa at 30-32). So it is at least arguable, and thus a contested issue of fact, that at the time Chapa wrote his police report – as opposed to the later time at which he gave his *deposition* testimony – Chapa indeed gave significant advertence to the disputed May 20th letter. Defendants' summary judgment argument concluded that "he [Chapa] had confirmation that [Petitioner] was still banned from campus". (Defendants' Motion for Summary Judgment at 8). The precise nature of this *confirmation* remains undisclosed by defendants / respondents. But more importantly, Chapa's after-the-fact confirmation cannot supply before-the-fact probable cause for arrest.

Respondents' attitudes and conduct were in gross deviation from any rational standard of care; and such reckless indifference to facts undermines any assertion of good-faith in making the arrest.

B. The Template Against Which Warrantless Police Conduct Is Measured And Restrained

Case law cited in both courts below involved fact scenarios where the arresting officer verified his suspicions by making inquiries to third parties. For example, in Bodzin v. City of Dallas, 768 F.2d 722 (5th Cir.1985), cited in passing by the Fifth Circuit court below, the arresting officer first discussed the complaint with the property owner; and then arrested the plaintiff only after he refused a police request to leave the

property. *See also* Lang v. City of Nacogdoches, 942 S.W. 2d 752 (Tex. App. – Tyler 1997) (arresting officer first read a power of attorney, and then verified propriety of arrest by calling back to police desk sergeant). A more seasonal example is Devenpeck v. Alford, No. 03-710, a case already granted certiorari and currently slated for oral argument in this Court. In Devenpeck, the arresting officer first telephoned his supervisor, then the deputy prosecutor, and then police authorities in an adjacent county, as well as actually reading a copy of the law upon which the arrestee based his objections to the arrest. While the actions of the arresting officers in Devenpeck, Bodzin and Lang represent extraordinary circumspection on the one hand, it is not to say on the other hand, that an officer such as respondent Chapa in the instant case has no duty whatsoever to advert to cautionary facts. Even an 'objective reasonableness' standard cannot condone an arresting officer in remaining deaf, dumb and blind to known facts which are readily available to him.

Probable cause exists where at the moment of the arrest, the facts and circumstances within the knowledge of the arresting officer would warrant a reasonable officer in believing that the suspect had committed or was committing an offense. *See* Dunaway v. New York, 442 U.S. 200, 208 n. 9 (1979) (observing that probable cause is an 'absolute' requirement embodying the 'best compromise' between conflicting interests of citizen privacy and the needs of law enforcement). A police officer's awareness of facts that would support an exculpatory defense may negate probable cause. *See* Jocks v. Tavernier, 316 F.3d 128, 135-36 (2d Cir. 2003) (holding that case was properly submitted to jury on issue of whether arresting officer was aware that plaintiff was acting in self-defense). Officer Chapa refused to attempt to confirm petitioner's assertions that the trespass ban had expired, testifying that "*there were no questions to be asked*". (Deposition of Paul Chapa at 27-28).

Nor was petitioner's case an example of an 'honest mistake ... made by officers in the dangerous and difficult process of making arrests'. Maryland v. Garrison, 480 U.S. 79, 87 (1996). Any fair implementation of our Fourth Amendment should accommodate good-faith police errors committed in the process of apprehending criminals. Petitioner's case, in contrast, is an occasion where upon calm reflection unencumbered by any species of exigent circumstance or necessity, respondents willfully ignored well-established law in furtherance of an ill-conceived and on-going administrative boondoggle. Even though sham and pretext cannot be factors in determining the existence of probable cause, the decision to arrest must be imbued nonetheless with the kind of objective good-faith which is the hallmark of reasonableness under the Constitution. Officer Chapa's arrest failed this test.

II. In Cases Under 42 U.S.C. §1983 Probable Cause Is A Determination For the Jury to Make - Particularly Where All of the Basic and Material Facts of the Case Are Disputed

Where in criminal cases the issue of whether a police officer had probable cause to make an arrest is a question for the court to decide, there is substantial authority that in section 1983 cases this issue should be submitted to the jury upon proper instructions defining probable cause. *See, e.g.*, Thacker v. City of Columbus, 328 F.3d 244, 255 (6th Cir. 2003) (finding probable cause in section 1983 case is a jury question, unless there is only one reasonable determination possible); Montgomery v. DeSimone, 159 F.3d 120, 125-26 (3d Cir. 1998) (holding in section 1983 case that probable cause determination rests entirely on the credibility of the witnesses); Kennedy v. Los Angeles Police Dept., 887 F.2d 920, 924 (9th Cir. 1989); McKenzie v. Lamb, 738 F.2d 1005, 1009-10 (9th Cir. 1984) (Kennedy, J., finding evidence justifying further investigation did not support probable cause for arrest); *but see* Weyant v. Okst, 101 F.3d 845, 852

(2d Cir. 1996) (question may be determined as a matter of law if there is no dispute as to pertinent events and knowledge of the arresting officer). In the instant case, every significant and material fact is fiercely disputed by the parties; chief among these disputed facts is the question of probable cause for arrest.

Because plaintiff has the burden of proof on the question of probable cause and reasonableness, the question may be resolved on summary judgment only if the plaintiff cannot come forward with facts from which bad faith can be inferred after indulging all inferences and presumptions in a light favorable to petitioner. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Since the question is a factual one, plaintiff may rely on circumstantial rather than direct evidence. Wyatt v. Cole, 504 U.S. 158, 173-74 (1992) (Kennedy, J., concurring).

Petitioner's circumstantial case against respondents is readily demonstrated. Petitioner's suspension was due to expire on May 20, 2000. When petitioner telephoned Johnson to begin the process of returning to the school, respondent Johnson, for reasons known only to her, opposed and sought to obstruct petitioner's return. During their telephone conversation, Johnson could have informed petitioner that his physical exclusion from campus continued past May 20, 2000 – but she did not. Johnson promised to act on plaintiff's petition to re-enter and to notify him of her decision – but she did not. Instead, Johnson drafted a letter on May 20, 2000, sent the letter around to numerous persons on campus, but failed to send the letter to petitioner. When petitioner arrived on campus on Thursday morning May 25, 2000 to make inquiries about the summer session, Johnson joined respondents Hill and Chapa when they met petitioner in the financial aid office. Johnson made a disingenuous query about whether Petitioner had received her May 20th letter – which letter Johnson knew or should have known she

had not mailed to petitioner. Petitioner responded that he knew nothing about any such letter – again putting Johnson on notice that any culpability or fault in these circumstances was not petitioner's. Johnson then stated that she would go and get petitioner a copy of the letter. Johnson left the lobby, and petitioner was arrested.

Johnson, in her deposition in the case, has repeatedly denied being at the scene of petitioner's arrest – a false statement. (Deposition of Karen Johnson at 7-8, 10, 69-70). And Johnson has dissembled, under oath, about having mailed petitioner the May 20, 2000 letter. (Deposition of Karen Johnson at 17). Maybe respondent Johnson, in directing petitioner's arrest, believed she was protecting other female students from some perceived threat. Maybe Johnson was reacting to criticism of the manner in which she handled petitioner's disciplinary case. Maybe Johnson believed that petitioner's punishment had not been severe enough – and that his arrest was a way to impose a further modicum of sanction. Or maybe this had been a student disciplinary matter that simply had not worked out the way Johnson had planned. Whatever the case, petitioner's allegations of facts - coupled with the deposition testimony of respondents - cast doubt on the objective reasonableness and legal justification for petitioner's arrest. Johnson's failure to disclose pertinent exculpatory facts, in concert with Officer Chapa's utter and active indifference to facts counseling against arrest, created a perfect storm of malfeasance resulting in an unlawful seizure and arrest. But more to the point, it is beyond question that in this case the issue of reasonableness is a *factual* one for determination by a jury. *Cf.* City of Monterey v. Del Monte Dunes, 526 U.S. 627 (1999) (holding issue of reasonableness in §1983 takings case was a question properly submitted to the jury).

III. The Courts Below Erred In Finding That Respondents Were Entitled To A Qualified Immunity

A. Private Party Section 1983 Defendants Cannot Claim A Qualified Immunity Defense

The modern qualified immunity doctrine evolved from the common law good-faith and probable cause defenses available to public officials; and is itself a substantial divergence from the historical common law norm. *See* Harlow v. Fitzgerald, 457 U.S. 800, 816-817 (1982) (finding traditional requirement for showing of subjective good-faith in defendant's actions to be 'incompatible' with modern policy goal of early dismissal of distracting and insubstantial suits against government officials). The Supreme Court has been grudging, however, when pressed to extend the doctrine to protect *private party* defendants. *See* Wyatt v. Cole, 504 U.S. 158, 167-68 (1992) (concluding that the rationales mandating qualified immunity for public officials are not applicable to private parties).

Respondents Johnson, Chapa, Hill and the university are all private parties. None of respondents' activities are principally concerned with enhancing the public good, nor do they occupy offices which require them to exercise discretion in the conduct of their business affairs. The qualified immunity recognized in Harlow and its progeny acts to safeguard *government*; and the rationales for protections from suit accorded to public officials are simply not transferable to private actors such as respondents. And because no public interest will be impaired by requiring respondents to resolve their legal disputes in court, no valid policy argument exists for extension of the qualified immunity defense to these private parties. *See generally* Wyatt, at 167-68.

The Court in Wyatt answered only the narrow question whether a private defendant could assert qualified immunity as a defense to section 1983 liability for invoking a state replevin statute. Left unanswered for another day was the question whether "*private defendants faced with §1983 liability ... could be entitled to an affirmative defense based on good faith and/or probable cause or that §1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens*". Wyatt, at 169. With the issue fairly before the Court, this case presents the opportunity for a salutary exposition of the relative burdens of proof in section 1983 suits against private party defendants.

B. Petitioner's Right To Be Free From Unreasonable Arrest Was Clearly Established; Thus, All Respondents Are Vicariously Liable for Damages Arising From The Violation

A qualified immunity defense is unavailable where the rights violated by defendant were 'clearly established 'at the time of violation. Harlow v. Fitzgerald, 457 U.S. at 817-818; *but see* Saucier v. Katz, 533 U.S. 194, 216-17 (2001) (Ginsburg, J., concurring and observing that where the arresting officer's actions are in the first instance unreasonable under the Fourth Amendment, there is no need for a two-step qualified immunity analysis). The contours of petitioner's Fourth Amendment right to be free from unreasonable and unjustified arrest was a clearly established, basic constitutional right which Officer Chapa, and by extension his administrative superiors Johnson, Hill, and the university reasonably would and should have been aware. In the context of joint activity by these closely connected private actors, facts and knowledge held by one actor can be imputed to all. Officer Chapa, acting on their behalf, is presumed to know what his employers knew.

Johnson and Hill were both policymaking officials of the university. Johnson and Hill had extensive knowledge about the specifics of petitioner's case. When the university's own private police officer - at the instigation and direction of Johnson and Hill – arrested petitioner, such action represented an act of policy on the part of the university; and each of the parties is vicariously liable for damages arising out of the arrest. *Cf.* Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986) (reasoning that a municipality may be liable under section 1983 for a single decision by its legislative body – whether or not that body had taken similar action in the past or intended to do so in the future – because even a single decision by such a body unquestionably constitutes an act of official government policy); Owen v. City of Independence, 445 U.S. 622 (1980) (Court was 'unwilling to suppose that injuries occasioned by municipality's unconstitutional conduct were not also meant to be fully redressable through [civil litigation]'); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978) (assigning municipal liability under §1983 to officials whose acts or edicts may fairly be said to represent official policy). Where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983. Pembaur, *supra,* at 481. This reasoning has even more force where defendants are private party, non-governmental actors for whom the various policy rationales precluding vicarious liability do not apply. In the present context, if defendant Chapa is liable, all of the defendants are liable.

IV. The Federal Circuit Courts Are Split – And Somewhat Confused - Over The Question Of The Existence Of A Federal Cause of Action For Malicious Prosecution Under 42 U.S.C. §1983.

A. Recent Controlling Fifth Circuit Precedent Holds No Federal Cause of Action for Malicious Prosecution Perpetrated 'Under Color of Law'.

Of course, petitioner's case and arguments all beg the question whether there still remains a federal cause of action for malicious prosecution under 42 U.S.C. §1983. *See* Albright v. Oliver, 510 U.S. 266, 271-275 (1994) (requiring that cause of action be tied to an explicit textual source of constitutional protection; but expressing no view as to whether malicious prosecution claim would succeed under the Fourth Amendment). Both courts below held that petitioner could make out no case for either false arrest or malicious prosecution under section 1983. The federal circuit courts remain split on the question of a §1983 malicious prosecution cause of action; and their rationales for judgment vary widely in some instances. *See* Castellano v. Fragozo, 352 F.3d 939, 945 (5th Cir. 2003) (finding the Fifth Circuit 'not alone' in failing to articulate the elements of the malicious prosecution cause of action under section 1983); *see also* Nieves v. Sweeney, 241 F.3d 46, 53 (1st Cir. 2001) ('assuming without deciding' that a malicious prosecution can ground a cause of action under 42 U.S.C.§1983); Murphy v. Lynn, 118 F.3d 938, 944(2d Cir. 1997); Donahue v. Gavin, 280 F.3d 371, 380 (3d Cir. 2002) (questioning the need for plaintiff's showing of malice); Haupt v. Dillard, 245 F.3d 758 (9th Cir. 2000) (requiring additional element of intent to deprive a constitutional right); Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996) (limiting the constitutional tort to a violation of the Fourth Amendment right to be free from unreasonable seizures); Wood v. Kesler, 323 F.3d 872, 881-82 (11th Cir. 2003) (incorporating both

state and federal common law tort elements); *but see* Lambert v. Williams, 223 F.3d 257, 262 (4th Cir. 2000) (finding "no such thing as a §1983 malicious prosecution claim.... It is not an independent cause of action."); Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001) (reasoning that nothing but confusion would be gained by calling the legal theory 'malicious prosecution'); Kurtz v. Shrewsbury, 245 F.3d 753 (8th Cir. 2000); *compare* Frantz v. Village of Bradford, 245 F.3d 869, 876 (6th Cir. 2001) (rejecting as 'non-existent' a §1983 claim based on malicious prosecution) *with* Darrah v. City of Oak Park, 255 F.3d 301, 312 (6th Cir. 2001) (citing circuit precedent which upholds §1983 cause of action for malicious prosecution). Clearly, some further guidance from the Court is needed.

B. The Fifth Circuit Changed The Law During The Pendency Of This Case Regarding The Existence of A Cause of Action for Malicious Prosecution Under 42 U.S.C. §1983.

In March 2002 at the time petitioner filed suit in this cause, the rule of law in the Fifth Circuit held that an allegation of false arrest and malicious prosecution were cognizable federal claims under 42 U.S.C. §1983. *See, e.g.*, Gordy v. Burns, 294 F.3d 722 (5th Cir. 2002) (decided June 16, 2002); Piazza v. Mayne, 217 F.3d 239 (5th Cir. 2000); Kerr v. Lyford, 171 F.3d 330 (5th Cir. 1999); Evans v. Ball, 168 F.3d 856 (5th Cir. 1999); Sanders v. English, 950 F.2d 1152 (5th Cir. 1992). In September, 2003 when petitioner filed his notice of appeal, Gordy had been reaffirmed by the court in Castellano v. Fragozo, 311 F. 3d 689 (5th Cir. 2002) ('Castellano I' decided on November 20, 2002). Rehearing *en banc* was granted on February 5, 2003. *See* Castellano, 321 F.3d 1203 (5th Cir. 2003).

When the Fifth Circuit subsequently reversed long-standing precedent in Castellano v. Fragozo, 352 F.3d 939

(5th Cir. 2003) (decided in December, 2003), the court wiped away a generation of case law providing redress for malicious prosecution and related wrongs committed under color of law. At the same time, the Fifth Circuit pulled the rug from under the foundational arguments in petitioner's appellate brief – which brief was at that time in peaceful repose on file in the Fifth Circuit clerk's office.

There are, of course, no hard and fast rules relating to remand in the face of changed and changing precedent. The matter is always, and largely, a matter for the court's considered discretion. The equities here involve a shift by the appellate court on a fundamental - and highly controversial - point of federal law which shift denied petitioner the possibility of a well-pleaded complaint. At the minimum, a grant, vacate and remand from this Court is appropriate to accord petitioner the opportunity to conform his pleadings and allegations to the new normal.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons shown, Petitioner prays that the Court grant the petition for a writ of certiorari; as well as any other and such further relief to which at law or in equity the Petitioner may show himself justly entitled.

Respectfully submitted,

Michael Barnes
Petitioner Pro Se
10806 Endicott Lane
Houston, Texas 77035
(713) 729 -8564

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL L. BARNES

Petitioner,

VS.

KAREN JOHNSON, Individually and as Dean of Students, St. Mary's University; ANDREW HILL, Individually and as Assistant Dean of Students, St. Mary's University; PAUL CHAPA, Individually and as Sergeant, St. Mary's University Campus Police; and ST. MARY'S UNIVERSITY, A Private Religious Educational Institution Organized Under The Laws Of Texas

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for
The Fifth Circuit

APPENDIX

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APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL R. BARNES, Plaintiff, v. KAREN JOHNSON Individually and as Dean of Students; ST MARY'S UNIVERSITY a private religious, educational corporation organized under the laws of Texas; ANDREW HILL, Individually and as Assistant Dean of Students; and PAUL CHAPA, Sergeant in the Campus Police, Defendants.	FILED APR 07 2003 CLERK, U.S. DISTRICT COURT WESTERN DISTRICT OF TEXAS /S DEPUTY CLERK CIVIL NO. SA-02-CA-247-FB

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO; Fred Biery
United States District Judge

Pursuant to the order of referral in the above-styled and numbered cause of action to the undersigned United States Magistrate Judgel and consistent with the authority vested in United States Magistrate Judges under the provisions of 28 U.S.C. § 636(b)(I)(B) and rule l(d) of the Local Rules for the Assignment of Duties to United States Magistrates, effective January 1, 1994, in the Western District of Texas, the following report is submitted for your review and consideration.

I. JURISDICTION

The Court has subject matter jurisdiction. 28 U.S.C. §§ 1331, 1343 and 1367 and 42

1 Docket no. 2.

U.S.C. § 1983.

II. PROCEDURAL HISTORY

Plaintiff, Michael L. Barnes ("plaintiff or "Barnes"), filed his complaint in this Court on March 13, 2002, claiming that defendants, Karen Johnson, individually and as Dean of Students of St. Mary's University ("Dean Johnson") and St. Mary's University (at times "St. Mary's"), jointly and severally, violated 42 U.S.C. § 1983 by depriving plaintiff of "rights guaranteed by the Constitution and laws of the United States and the laws of the state of Texas."2 Plaintiff's claims against defendants relate to plaintiffs arrest on or about May 25, 2000, at St. Mary's University for criminal trespass, a charge that later was dismissed by the Bexar County District Attorney's Office. Plaintiff's first claim for relief alleges a violation of § 1983 based on alleged violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights stemming from his allegedly false arrest and false imprisonment on May 25,2000, when defendants "intentional[ly] fail[ed] to notify plaintiff of administrative action on his petition for readmission as the pretext for alleging the criminal trespass."3 Plaintiff's second claim for relief alleges a violation of § 1983 based on alleged violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights stemming from the malicious prosecution of plaintiff for trespass on May 25, 2000.4 Plaintiff's third and fourth causes of action allege false arrest and imprisonment under Texas law and malicious prosecution under Texas law.5 Plaintiff requests compensatory

2 Docket no. 1 at 1.
3 Id. at 10 and 8-11.
4 Id. at 11.
5 Id. at 12 and 13.

damages, punitive damages, attorney's fees, costs, and pre and post judgment interest.6

On April 5, 2002, defendants filed their combined motion to dismiss and answer.7 Defendants deny certain factual allegations and argue that plaintiff "failed to plead any conduct committed by a person acting under color of state law"8 and "there is no pleading or allegation of any state participation, coercive or significant."9 Therefore, defendants sought the dismissal of plaintiff's § 1983 claims with prejudice for failure to state a claim upon which relief can be granted and dismissal of plaintiff's pendent state law claims without prejudice.10 On April 22, 2002, plaintiff filed his response, arguing that: the complaint sufficiently alleges action under color of state law based in part on the allegations that defendants "willfully and purposefully failed to notify plaintiff in writing or otherwise of administrative action regarding plaintiff's petition for readmission," there was a "pre-arranged plan for plaintiff's arrest," the St. Mary's campus police did arrest plaintiff for trespass, and plaintiff was prosecuted for trespass in Bexar County Court at Law No.2, showing that the decision of St. Mary's campus police to arrest plaintiff was "effective."11 On May 8, 2002, the undersigned issued a report and recommendation which recommended, in sum,

that those portions of defendants' motions to dismiss which may be construed to request

6 Id. at 14-15.
7 Docket no. 3.
8 Id. at 1.
9 Id. at 2.
10 Id. at 1 and proposed order.
11 Docket no. 5 at 4-7.

dismissal of plaintiff's § 1983 claim based on the Eighth Amendment should be granted and the § 1983 claims alleging a violation of plaintiff's Eighth Amendment rights should be dismissed; in all other respects, the motion to dismiss should be denied at this time on the ground that, viewing all facts and inferences in favor of plaintiff, the Court cannot conclude that plaintiff has not alleged action "under color of state law" sufficient to state a claim under § 1983.12

On June 13, 2003, the District Court accepted the report and dismissed plaintiffs claims based on the Eighth Amendment.13

On August 29,2002, plaintiff filed his first amended complaint which, among other things, deleted the § 1983 claim based on the Eighth Amendment and added claims against newly named defendants Andrew Hill, Associate Dean of Students on May 25, 2000 ("Dean Hill") and Paul Chapa, a Sergeant in the St. Mary's Campus Police on May 25, 2000 ("Sergeant Chapa").14 Plaintiff's first claim for relief alleges a violation of § 1983 based on alleged violations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights stemming from his allegedly false arrest and false imprisonment on May 25, 2000, when defendants "intentional[ly] fail[ed] to notify plaintiff of administrative action on his petition for readmission as the pretext for alleging the criminal trespass which was the basis of his subsequent arrest and incarceration."15 Plaintiff's second claim for relief alleges a violation of § 1983 based on alleged

12 Docket no. 6 at 17.

13 Docket no. 8.

14 Docket no. 15. After filing the amended complaint, defendants filed a motion strike the amended complaint on the ground that plaintiff has not received the permission of the Court to amend. Docket no. 17. Following briefing on the issue, the Court entered an Order granting plaintiff leave to amend and declining to strike the complaint. Docket no. 20. Plaintiff agrees that Paul Chapa is no longer an officer with the St. Mary's Campus Police and Andrew Hill currently serves as Assistant Dean at St. Mary's Law School. Docket no. 15 at 2.

15 Docket no. 15 at 11 and 9-11.

violations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights stemming from the malicious prosecution of plaintiff for trespass on May 25, 2000.16 Plaintiffs third claim for relief allege false arrest and imprisonment under Texas law.17 Plaintiff's fourth claim for relief alleges malicious prosecution under Texas law.18 Plaintiff requests compensatory damages, punitive damages, attorney's fees, costs, and pre and post judgment interest.19

On November 19, 2002, the deadline for filing dispositive motions, defendants Johnson and St. Mary's University filed their combined motion for summary judgment.20 On November 20, 2002, the Court entered an Order calling upon plaintiff to file his response on or before December 6, 2002. On December 6, 2002, plaintiff filed a motion for continuance and to stay any hearing on the motion for summary judgment. On December 18, 2002, defendant former- Officer Paul Chapa filed his answer to the first amended complaint.21 On February 18, 2003, defendants Johnson, St. Mary's University and Dean Andrew Hill filed their combined answer to the first amended complaint.22

On January 27, 2003, the Court entered an Order which granted a continuance, allowed plaintiff additional time to depose defendants Andrew Hill and Paul Chapa, and established a

16 Id. at 11-12.
17 Id. at 12.
18 Id. at 13.
19 Id. at 14-15.
20 Docket no. 22.
21 Docket no. 27.
22 Docket no. 29.

supplementary briefing schedule by which defendants could supplement the motion for summary judgment following the completion of additional discovery and plaintiff could file a consolidated response to the motion for summary judgment and any supplemental or additional motion for summary judgment.23

On March 4, 2003, defendants filed a consolidated supplemental motion for summary judgment.24 On March 13, 2003, plaintiff filed his supplemental response.25

III. FACTUAL SUMMARY

The following facts appear to be undisputed for purposes of summary judgment, unless otherwise noted:

Plaintiff was admitted to St. Mary's University School of Law ("Law School") and he enrolled beginning in the Fall 1998 semester.26

On or about September 20, 1999, Laurel Englemann, a female student at the Law School wrote a letter to Dean Johnson "to formally file a claim of sexual harassment against Michael Barnes for the incident that occurred on Sunday, September 12, 1999, at about 11:30 p.m."27 On

23 Docket no. 28.

24 Docket no, 30.

25 Docket no. 31.

26 Docket no. 22, exhibit 1.

27 Id., exhibit 7. Ms. Englemann attached a copy of the police report to her letter. Id. Ms. Englemann' s letter further states: "I find his behavior extremely disturbing, especially in light of the incidents involving him last year of which the University was aware." Id. Defendant's summary judgment motion and exhibits refer to: (a) a September 11, 1998, complaint received by St. Mary's University Campus Police from one of its female students, Kimberly M. Isaacs, that a person driving vehicle, later identified as belonging to plaintiff, followed her home from school (Id. at 3 and exhibit 3); and (b) a September 30, 1998, complaint

September 12, 1999, plaintiff had been arrested near Ms. Englemann's apartment on charges of failure to identify to a police officer and six outstanding warrants.28 St. Mary's University instituted a student conduct proceeding in accordance with the student handbook. Dean Johnson notified plaintiff that his behavior constituted a failure to comply with the student Code of Conduct.29

On November 10, 1999, Dean Johnson informed plaintiff, by letter, of the decision reached at the hearing held on the conduct complaint.3O The letter stated that it had been found that plaintiff had failed to comply with the Student Code of Conduct and had engaged in conduct inconsistent with the Christian goal and informed plaintiff that the following sanctions had been imposed: (a) plaintiff was suspended beginning December 21, 1999 and until May 20,2000 during which time he was banned from the premises of St. Mary's University, (b) plaintiff could petition for return after his period of suspension, and (c) plaintiff was to undergo a behavioral assessment by November 19, 1999, failure to keep the appointment would result in further disciplinary action, plaintiff was required to sign a release so that the counselor could speak with Dean Johnson about plaintiff's evaluation, and plaintiff's continuing status as a student would be

made by residents of the Piper's Creek Apartments that a man was engaging in lewd conduct while looking into the windows of one of the apartments, in which one of the witnesses identified plaintiff, who was found at the scene in his vehicle, as the suspicious person she had seen lingering outside earlier in the evening, but, according to the report, the complaining witness did not identify plaintiff positively.

28 Id., exhibit 5.

29 Docket no. 1 at 3-4; docket no. 15 at 4.

30 Docket no. 1 at 3, exhibit A at 1; docket no. 15 at 4, exhibit A at 1; docket no. 22, exhibit 9.

decided based on the assessment.31

Barnes appealed his suspension. The Acting President of St. Mary's University upheld the suspension.32

On January 31,2000, St. Mary's University Campus Police issued plaintiff a warning citation for criminal trespassing and walked plaintiff off the campus.33 On February 15, 2000, plaintiff attended a behavioral assessment.34 On May 2, 2000, plaintiff wrote a letter asking to be reinstated as a law student and to resume classes with the summer session scheduled to begin May 22, 2000.35

On May 9, 2000, the psychologist notified Dean Johnson that she could not recommend plaintiff's return to St. Mary's Law School before plaintiff received further evaluation and treatment.36 That same day, May 9, 2000, Dean Johnson wrote plaintiff that his petition for readmission would not be considered until after he submitted proof of attendance at counseling sessions which, according to Dean Johnson's letter, plaintiff had agreed to attend in his February 15, 2000 assessment, and until the psychologist who performed the assessment for St. Mary's University could speak with plaintiff's therapist from whom plaintiff had been receiving

31 Id.
32 Docket no. 22, exhibit 29.
33 Docket no. 22, exhibit 12; docket no. 31, exhibit 20.
34 Docket no. 22 at 4.
35 Id., exhibit 15.
36 Id., exhibit 16.

treatment.37 The letter states: "We will meet to consider your readmission after this documentation is received and reviewed."38 Plaintiff admits that he received the May 9, 2000 letter from Dean Johnson.39

On May 17, 2000, plaintiff telephoned Dean Johnson to talk about his petition for readmission. Plaintiff contends he informed Dean Johnson he had not been aware of the counseling requirement referenced in her May 9, 2000 letter, "a new and previously undisclosed condition precedent to his return to the university,"40 "told her that, in any event, I had decided not to do that for my own personal reasons; and that the application I had sent to her - or the petition I had sent to her for readmission, along with whatever other documents that are in may file, were more than adequate for her purposes to make a decision on my return to the University."41 Dean Johnson responded that she could make a decision on the existing materials, stating, "I can do that."42

37 Docket no. 1 at 4 and exhibit B; docket no. 15 at 4 and exhibit B; docket no. 22, exhibits 16 and 17.

38 Docket no. 1, exhibit B; docket no. 15, exhibit B; docket no. 22, exhibit 17.

39 Docket no. 1 at 4 and exhibit B; docket no. 15 at 4 and exhibit B. Plaintiff contends that before receiving the May 9, 2000 letter, he was not aware of any agreement to attend counseling sessions "as a condition precedent to his readmission to the university." Docket no. 1 at 3-4; docket no. 15 at 4-5.

40 Docket no. 1 at 4; docket no. 15 at 5; and docket no. 22 at 5.

41 Docket no. 26, exhibit 18 at 64.

42 Id. at 65; docket no. 1 at 4; docket no. 15 at 5; docket no. 22 at 5. Dean Johnson testified at her deposition that she recalls telling plaintiff on May 17, 2000 that before St. Mary's could consider plaintiff s application for readmission, plaintiff "would need to seek some counseling as outlined in Dr. Huerta's letter," docket no. 26. exhibit 17 at 34, but that plaintiff had said he had "decided not to pursue any counseling in Houston," ill. at 33, and "insisted upon

On May 25, 2000, plaintiff went on the Law School campus. Law School personnel43 contacted defendant Associate Dean Hill who then called the Campus Police. The Campus Police arrested plaintiff for criminal trespass. After plaintiff was detained, plaintiff contends he was given a copy of the May 20, 2000 letter from Dean Johnson that advised his application for readmission had not been approved and he was still banned from campus, and plaintiff contends he told the Campus Police he had not previously received his copy of the letter. The Campus Police made a check for outstanding warrants and learned that plaintiff had outstanding warrants from the San Antonio Police Department ("SAPD").44 Campus Police transported plaintiff to SAPD. Formal criminal charges of criminal trespass were filed against plaintiff in Bexar County Court at Law No.2, docket no. 75626. On or about March 15, 2001, the changes were dismissed.45

According to defendants' uncontested summary judgment proof:46 Barnes was readmitted

a decision on his application" based on the existing information, Id. at 34. Dean Johnson agreed that she believed it was true that she told plaintiff she "could make a decision" or, possibly, "I can do that." Id..

43 Victoria Mather, deposed by plaintiff, testified that it she "[p]robably" was the one who contacted Dean Hill on May 25, 2000 to tell him plaintiff was on campus. Docket no. 26, exhibit 13 at 7. She recalled being told that plaintiff "was on campus; that there was a no- trespass warrant and he wasn't supposed to be on campus. So I called Andy Hill and asked him to come down and take care of it, if that was the situation." Id.

44 Docket no. 31, exhibits 22 and 23.

45 Docket no. 1 at 7 and exhibit D; docket no. 15 at 7 and exhibit D.

46 Defendants included summary judgment evidence to establish the facts summarized in this paragraph. Plaintiff has offered no objection to this evidence nor has he identified in his briefs any specific summary judgment evidence which contradicts the facts.

to the Law School and graduated in the Summer of 2001.47 Plaintiff's application for admission to the State Bar of Texas was not approved.48 In the course of a hearing held by the Board of Law Examiners, plaintiff disclosed that he had been arrested in 1988 for looking into a female's bedroom window while she was getting dressed for work; plaintiff indicated he pleaded no contest to the charge.49 Plaintiff did not disclose this arrest on his application to the Law School.50 Plaintiff also admitted that his car had been identified by the female Law School student as having followed her home from the parking lot at the Law School on or about September 12, 1998 and plaintiff was the suspect described by complainants at the Piper Creek Apartments on or about September 30, 1998.51

IV. ISSUES PRESENTED

1. Are defendants entitled to judgment as a matter of law on plaintiff s claims under § 1983 for false arrest and imprisonment and malicious prosecution and on plaintiff's pendent state law claims for false arrest and imprisonment and malicious prosecution?

2. Is defendant Sergeant Chapa entitled to qualified immunity for his arrest of plaintiff on May 25, 2000?

3. Are each of plaintiff's claims against defendants Dean Hill and Sergeant Chapa

47 Docket no. 22 at 5.

48 Id.

49 Id.

50 Id.

51 Docket no. 22 at 5 and exhibit 23 (plaintiff "admitted to the Board that he was the suspect identified in the police report of the complaint"). In his deposition, plaintiff admitted that he had not truthfully answered question 14(a) on his original application for admission to St. Mary's because he had been arrested within ten years of the date of his application. Docket no. 26, exhibit 18 at 12 and docket no. 22, exhibit 1.

barred by the statute of limitations?

V. SUMMARY JUDGMENT STANDARD

The standard to be applied in deciding a motion for summary judgment is set forth in Federal Rule of Civil Procedure 56, which provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.52

The summary judgment movant bears the initial burden of providing the court with a legal basis for its motion and identifying those portions of the record which it alleges demonstrate the absence of a genuine issue of material fact.53 The movant must establish that if the evidence of record "were reduced to admissible evidence in court," the evidence would be insufficient to allow the opposing party to carry its burden.54

If the movant satisfies this burden, then the nonmovant "must set forth specific facts showing a genuine issue for trial and may not rest upon mere allegations or denials of its pleadings."55 Rule 56 requires that there be no genuine issue of material fact.56 A fact is material

52 FED. R. CIV. P. 56(c); Celotex Com. v. Catrett, 477 U.S. 317, 322,106 S.Ct. 2548, 2552 (1986).

53 Celotex Com., 477 U.S. at 323, 106 S.Ct. at 2553.

54 Id at 327, 106 S.Ct. at 2555; Beck v. Texas State Bd. of Dental Examiners, 204 F.3d 629,633 (5th Cir.), cert denied, 531 U.S. 871 (2000).

55 Beck, 204 F.3d at 633 (citing Anderson v. Liberty Lobby. Inc., 477 U.S. 242,249, 106 S.Ct. 2505,2511 (1986)).

56 Anderson, 477 U.S. at 247, 106 S.Ct. at 2510.

if it might affect the outcome of the lawsuit under the governing law.57 More than a "metaphysical doubt as to the material facts" is required.58 A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.59 Therefore, summary judgment is proper if, under governing laws, there is only one reasonable conclusion as to the verdict; if reasonable finders of fact could resolve a factual issue in favor of either party, summary judgment should not be granted.60

All evidence and inferences drawn from that evidence must be viewed in the light favorable to the party resisting the motion for summary judgment.61 Thus, summary judgment motions permit the Court to resolve lawsuits without the necessity of trials if there is no genuine dispute as to any material facts and the moving party is entitled to judgment as a matter of law.62

VI. ARGUMENTS AND CONCLUSIONS OF LAW

A. SUMMARY OF ARGUMENTS

Defendants Dean Johnson and St. Mary's University moved for summary judgment on five grounds. With respect to the § 1983 claim based on false arrest and false imprisonment,

57 Anderson, 477 U.S. at 248,106 S.Ct. at 2510; Thomas v. LTV Com., 39 F.3d 611, 616 (5th Cir. 1994).

58 Beck,204 F.3d at 633 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Com., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986).

59 Anderson, 477 U.S. at 248, 106 S.Ct. at 2510; Wise v. E.I. DuPont De Nemours & Co 58 F.3d 193, 195 (5th Cir. 1995).

60 Anderson, 477 U.S. at 249, 106 S.Ct. at 2509.

61 Hibernia Nat'l Bank v. Carner, 997 F.2d 94,97 (5th Cir. 1993).

62 See Fields v. City of South Houston. Tex., 922 F.2d 1183, 1187 (5th Cir. 1991).

defendants argue that they are entitled to entry of judgment as a matter of law because the arresting officer, defendant Sergeant Chapa, had probable cause to believe plaintiff was present on campus after having been banned from the premises, and, therefore, had probable cause to arrest plaintiff for criminal trespass on May 25, 2000. With respect to plaintiff's § 1983 claim for malicious prosecution, defendants argue that they are entitled to entry of judgment as a matter of law because plaintiff cannot establish: he was innocent of criminal trespass; defendants did not have probable cause for the proceedings; and/or defendants acted with malice. With respect to plaintiff's claims of false arrest and imprisonment and malicious prosecution under Texas law, defendants argue that they are entitled to entry of judgment as a matter of law because plaintiff cannot establish that his detention on May 25, 2000 was without legal authority or justification. Further, defendants argue that defendant Sergeant Chapa is entitled to qualified immunity for his arrest of plaintiff on May 25, 2000. Finally, defendants argue that all of plaintiff's claims against Sergeant Chapa and Dean Hill are barred by the statute of limitations. Defendants submitted approximately seventeen exhibits in support of their motion for summary judgment, including St. Mary's University's records regarding plaintiff, certain correspondence, and excerpts from the depositions of plaintiff and Dean Johnson. Defendants' supplemental motion for summary judgment re-urges the arguments included in their original motion and submits, as additional summary judgment evidence, the deposition of Sergeant Chapa in support of their contention that Sergeant Chapa had probable cause to arrest plaintiff on May 25, 2000.

Plaintiff opposes summary judgment, arguing, in sum, that the existence of probable cause is not dispositive of the false arrest, false imprisonment and malicious prosecution claims because "the arrest was procured upon the duplicitous and malicious manipulations of defendant

Karen Johnson" through her "intentional failure" to mail Barnes her May 20, 2000 letter.63 Plaintiff argues that the parties' dispute about whether Dean Johnson mailed the May 20, 2000 precludes summary judgment.64 Plaintiff opposes Sergeant Chapa's alternative request for summary judgment based on his qualified immunity, arguing that "Karen Johnson's knowledge of the facts as well as her actual malice in this circumstance are sufficient to deny any of these actors the safe harbor of qualified immunity."65 Finally, plaintiff opposes summary judgment dismissing his pendent state claims brought against Dean Hill and Sergeant Chapa in the first amended complaint, arguing that "[a]ll of these claims against Hill and Chapa, however, relate back to the March 13, 2002 filing of Barnes' original complaint in this court."66

B. SECTION 1983 CLAIMS AGAINST ALL DEFENDANTS FOR FALSE ARREST, FALSE IMPRISONMENT, AND MALICIOUS PROSECUTION AND PENDENT STATE CLAIMS FOR FALSE ARREST, FALSE IMPRISONMENT, AND MALICIOUS PROSECUTION

Plaintiff Barnes has not named any public official as a defendant in this case. Plaintiff does not allege that any state governmental employee -- whether police officer, deputy sheriff, prosecutor or state judge -- conspired with defendants in connection with plaintiff's arrest, detention, and prosecution.67 Plaintiff does not allege a conspiracy among the named defendants

63 Docket no. 26 at 6-7.
64 Id. at 6-9.
65 Id. at 9-10.
66 Id. at 11.
67 As noted in the Court's review of defendants' motion to dismiss plaintiff's § 1983 - claim for failing to allege actions "under color of law," plaintiff's first amended complaint alleges that defendants' "pre-arranged plan for plaintiff's arrest" and the action of the state-licensed St. Mary's Campus Police in arresting plaintiff and causing plaintiff to be prosecuted in

to violate plaintiff's constitutional rights. Rather, plaintiff's first amended complaint focuses on plaintiff's contentions that Dean Johnson maliciously and intentionally did not mail the May 20, 2000 letter to plaintiff, planning "an ambush" of plaintiff when he returned to campus, and knew that plaintiff's May 25, 2000 arrest for criminal trespass was not well-founded, but caused his arrest for trespass anyway,68 and that the Campus Police falsely arrested plaintiff, based on Dean Johnson's "naked directive" and without making any independent investigation, causing plaintiff to be falsely imprisoned and maliciously prosecuted.69

Section 1983

Title 42 U.S.C. § 1983 does not create any substantive rights, but instead provides a remedy for violations of federal statutory and constitutional rights.70 In order to state a cause of action under § 1983, the plaintiff's claim for relief must allege facts establishing: (1) that plaintiff has been deprived of a right secured by the Constitution or laws of the United States; and (2) that the defendant acted under color of state law.71 False imprisonment and false arrest, as well as

state court are sufficiently intertwined with the state functions of arrest and prosecution such that the named defendants should be considered to have acted jointly and "under color of law." At the motion to dismiss stage, where all allegations of the complaint are construed in favor of plaintiff, the Court declined to find plaintiff had not stated a § 1983 cause of action. Defendants have not renewed their challenge to state action in the instant motion for summary judgment. Docket no. 22 at 6.

68 E.g.,docket no. 1 at 10; docket no. 26 at 6-7 and exhibit 17 at 39-41.

69 Docket no. 5 at 4-5.

70 See LaFleur v. Texas Deut. of Health, 126 F.3d 758,759 (5th Cir. 1997); Jackson v. City of Atlanta. Tex., 73 F.3d 60, 63 (5th Cir. 1996).

71 See Randoluh v. Cervantes, 130 F.3d 727,730 (5th Cir. 1997); Fyfe v. Curlee, 902 F.2d 401, 403 (5th Cir. 1990); Wong v. Stripling, 881 F.2d 200,202 (5th Cir. 1989).

malicious prosecution,72 can form the basis of a claim under § 1983. Because plaintiff has pleaded a § 1983 cause of action that is premised on his alleged false arrest, false imprisonment, and malicious prosecution, the Court discusses the pertinent aspect of plaintiff's § 1983 claim at the same time as the corresponding pendent state law claim.

False Arrest and False Imprisonment

In Texas, a person commits a criminal trespass if the person enters or remains on property or in a building of another without effective consent and the person either had notice that the entry was forbidden or received notice to depart but failed to do so.73 "Admittedly, a person who is falsely arrested is at the same time falsely imprisoned, . . . yet, 'it is not necessary, to commit false imprisonment, either to intend to make an arrest or actually to make an arrest.",74 In Texas, the elements of a cause of action for false imprisonment, an intentional tort, are: defendant wilfully detained plaintiff; the detention was without plaintiff's consent; and the detention was without legal authority or justification. 75 False arrest is simply a way of committing a false

72 Closs v. Goose Creek Consolo Indep. School Dist., 874 S. W .2d 859, 874-75 (Tex.Civ.App.-Texarkana, 1994) (citing Sanders v. English, 950 F.2d 1152,1159 (5th Cir. 1992); Brummett v. Camble, 946 F.2d 1178,1180 (5th Cir. 1991)).

73 Texas Penal Code § 30.05. State law determines the validity of an arrest without a warrant for a violation of state law, subject to minimum standards required by the Constitution. Bodzin v. City of Dallas, 768 F.2d 722, 724 (5th Cir. 1985) (reference to Texas law); see U.S. ex rel. LaBelle v. LaVallee, 517 F.2d 750 (2d Cir. 1975), cert. denied, 423 U.S. 1062 (1976); Burks v. U.S., 287 F.2d 117 (9th Cir. 1961), cert. denied, 369 U.S. 841 (1969).

74 Whirl v. Kern, 407 F.2d 781,790 (5th Cir. 1968) (citations omitted).

75 Wal-Mart Stores. Inc. v. adem, 929 S.W.2d 513,519 (Tex.Civ.App. 1996); Randall's Food Markets. Inc. v. Johnson, 891 S.W.2d 640,644 (Tex. 1995) (citation omitted).

imprisonment.76

A police officer in Texas may arrest a person for a misdemeanor offense without an arrest warrant if the officer has probable cause to believe that a crime has been committed in the officer's presence and the person in question committed that crime.77 Probable cause to arrest exists "where 'the facts and circumstances within. . . [the arresting officers'] . . . knowledge and of which they had reasonably trustworthy information. . . [are] . . . sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed."78 Probable cause is established by a "totality of the circumstances."79 Although probable cause requires more than a bare suspicion of wrongdoing, "[t]he probable cause inquiry is narrow,"80 and requires "substantially less evidence than that sufficient to support a

76 Whirl, 407 F.2d at 790.

77 Bodzin. 768 F.2d at 724.

78 U. S. v. Preston, 608 F.2d 626,632 (5th Cir.1979), cert. denied, 446 U.S. 940, 100 S.Ct. 2162 (1980) (quoting Draper v. U. S., 358 U.S. 307, 313, 79 S.Ct. 329,333 (1959)); Richey v. Brookshire Grocery Co., 952 S.W.2d 515,517 (Tex. 1997) ("We have long defined probable cause as 'the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor [complainant], that the person charged was guilty of the crime for which he was prosecuted.' Akin v. Dahl, 661 S.W.2d 917, 921 (Tex. 1983), cert. denied, 466 U.S. 938,104 S.Ct. 1911, 80 L.Ed.2d 460 (1984)... The probable cause determination asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted.") (citations omitted); Closs, 874 S.W.2d at 877 ("The question is not what the actual facts were, but what the prosecuting party honestly and reasonably believed the facts to be.") (citation omitted).

79 Lang v. City of Nacogdoches, 942 S.W.2d 752, 763(Tex.Civ.App.-Tyler, 1997).

80 Forbes v. Lanzi, 3 S. W.3d 895, 899 (Tex.App.-Austin, 2000, pet. denied).

conviction."81 An arrest based on assumptions later found to be erroneous may be valid if at the time of the arrest the officer had probable cause to believe that a crime had been committed and that the person arrested committed it.82

"Whether probable cause is a question of law or a mixed question of law and fact depends on whether the parties dispute the underlying facts."83 In this case, the Court bases its determination of probable cause on the undisputed material facts directed to probable cause to arrest and to initiate prosecution or, when appropriate, considers disputed issues in the light most favorable to the non-movant, plaintiff.84

It is uncontested between the parties that Dean Johnson wrote plaintiff a letter dated January 31, 2000, which informed plaintiff that, "effective immediately," he was suspended from St. Mary's University "until May 20, 2000."85 The letter stated: "Suspension means: 'Separation from STMU for a definite period of time, after which the student is eligible to petition for return.

81 U. S. v. Wadley, 59 F.3d 510, 512 (5th Cir.1995) (quoting U. S. v. Muniz-Melchor, 894 F.2d 1430,1438 (5th Cir.) (internal citation omitted), cert. denied, 495 U.S. 923,110 S.Ct. 1957 (1990)).
82 U.S. v. Allen, 629 F.2d 51 (D.C. Cir. 1980).
83 Richey, 952 S.W.2d at 518.
84 The Texas Court of Appeals in Forbes, when reviewing a jury verdict in favor of plaintiff on a malicious prosecution claim, stated that, given the disfavored status of malicious prosecution suits as a matter of public policy, the decision on probable cause to institute criminal prosecution must be made "by viewing only the facts and not drawing inferences from those facts; at least not inferences favorable to the plaintiff in the malicious prosecution suit." Forbes, 9 S.W.3d at 900 n.5.
85 Docket no. 22, exhibit 29 at 1; docket no. 26, exhibit 2 at 1.

During the period of suspension, the student is banned from the premises of STMU.'"86 The letter further stated that plaintiff could "petition, in writing, for readmission to St. Mary's University beginning with the Summer Session I, 2000" and the petition should be directed to the Dean of Students.87 Finally, a copy of this letter was sent to Stephen Ramirez, Director, University Police.88 Plaintiff received a warning ticket for criminal trespassing at St. Mary's University from the Campus Police on January 31,2000, and was escorted off campus.89 Plaintiff knew he was not welcome on campus.90 The parties also agree that, by letter dated May 2,2000 addressed to Dean Johnson, plaintiff applied to re-enter St. Mary's with the summer 2000 session.91 By letter dated May 9, 2000, which plaintiff admits he received, Dean Johnson told plaintiff that plaintiff's petition for readmission could not be considered until plaintiff had submitted documentation regarding his counseling:

> Before we can consider your petition for readmission, you must submit documentation regarding your therapy and ongoing treatment to Dr. Huerta for review. You must also sign a release with your therapist so that Dr. Huerta can consult with him/her regarding your therapy. We will meet to consider your readmission after this documentation is received and reviewed.92

Plaintiff has produced no summary judgment evidence to show that plaintiff did submit the

86 Id.
87 Id.
88 Id.
89 Docket no. 22, exhibit 12.
90 Docket no. 26, exhibit 18 at 52.
91 Docket no. 22, exhibit 15; docket no. 26, exhibit 3.
92 Docket no. 22, exhibit 17; docket no. 26, exhibit 4.

documentation requested of him on May 9, 2000. Rather, plaintiff agrees that on May 17, 2000, he told Dean Johnson he had not agreed to seek additional counseling and "insisted that she render a decision on my petition for readmission" based on existing information.93 Although plaintiff testified that Dean Johnson did not tell him that he was still banned from the campus,94 plaintiff has produced no summary judgment evidence to show that Dean Johnson ever told plaintiff that his May 2, 2000 petition for readmission to St. Mary's to attend the 2000 summer session had been approved. Plaintiff agreed that "as of May 17, 2000 you knew you had not been readmitted because your petition was still pending. . . ."95 Finally, it is uncontested that Sergeant Chapa arrested plaintiff for criminal trespass on May 25, 2000.

The contest, for purposes of summary judgment, appears to center on the terms of plaintiff's ban from campus and Dean Johnson's role in the distribution of her May 20, 2000 letter to plaintiff, with a copy to Stephen Ramirez, Director, University Police, which informed plaintiff in writing that his request for readmission had not been approved. Plaintiff's argument is premised on the language in the January 31, 2000 suspension letter that stated he was suspended "for a definite period of time" and "until May 20, 2000" and was "banned from the

93 Docket no. 26, Barnes affidavit, at 2.

94 Id. Dean Johnson also testified that she recalled telling plaintiff in their telephone conversation of May 17, 2000 that plaintiff "was still banned from the campus" (docket no. 26, exhibit 17 at 50). Accordingly, according to Dean Johnson, plaintiff should have received the May 20, 2000 letter and she reminded plaintiff in their May 17, 2000 conversation he was banned from campus.

95 Docket no. 26, exhibit 18 at 66.

premises of STMU" "during the period of suspension.96 Plaintiff argues that he did not receive a copy of Dean Johnson's May 20, 2000 letter which informed plaintiff he was "still banned from the premises of St. Mary's University."97 Plaintiff testified that he "would not have come to San Antonio and would not have entered onto the campus at St. Mary's University on that day" if he had "received or known about the letter prior to May 25, 2000."98 Therefore, plaintiff argues either: (a) plaintiff should not been arrested on May 25, 2000 for criminal trespass when he returned to campus because both his suspension and ban from campus expired on December 20, 2000 and/or (b) it was reasonable for plaintiff to have concluded that his suspension and ban from campus expired on May 20, 2000 such that it was reasonable for him to have returned to campus; and/ or (c) Dean Johnson deliberately did not send plaintiff a copy of her May 20,2000 letter so that plaintiff might be able to be arrested if he returned to campus.

With respect to Sergeant Chapa's actions on May 25, 2000, Sergeant Chapa testified at his deposition that Dean Hill called the Campus Police to report that plaintiff was in the Raba building. Sergeant Chapa knew that Campus Police had issued a criminal trespass warning to plaintiff prior to May 25 and knew what plaintiff looked like, saw plaintiff in the financial aid office, and asked plaintiff to come out to the lobby area to speak with him.99 Sergeant Chapa

96 Docket no. 22, exhibit 29; docket no. 26, exhibit 2. Apparently, Dean Johnson also wrote a memorandum to St Mary's employees who had dealings with plaintiff at the time of plaintiff's suspension that also refers to plaintiff being suspended "until May 20, 2000." Docket no. 26, exhibit 17 at 47.

97 Dean Johnson testified in her deposition that, after writing the May 20,2000 letter, she gave it to her secretary for mailing and distribution. Docket no. 26, exhibit 17 at 14.

98 Docket no. 26, Barnes affidavit at 3.

99 Docket no. 30, exhibit C at 20-22.

asked plaintiff to show his identification care to verify identity, and arrested plaintiff, advising plaintiff that "the criminal trespass warrant was in effect."100 Sergeant Chapa recalled no discussions with plaintiff or others who may have been at the scene prior to the arrest and testified that his intent to arrest plaintiff "was solely based on the issue of the criminal trespass warning that was issued to him."101 Sergeant Chapa testified that a St. Mary's investigator had been working with the San Antonio Police Department in connection with the stalking reports made against plaintiff and "I knew the criminal trespass warning was still active. It was posted on our criminal trespass board."102 When Sergeant Chapa was asked by plaintiff whether it would have "made a difference in your decision to make the arrest" if he had known plaintiff had not received the May 20, 2000 letter, Sergeant Chapa reiterated that, "I made my arrest on the [warning] citation [for criminal trespass] that was issued."103 Sergeant Chapa testified that neither Dean Johnson nor Dean Hill nor anyone else had asked Sergeant Chapa to arrest plaintiff on May 25, 2000,104 and he based his arrest on his knowledge of the existence of the January 31,

100 Id, at 22, 33.

101 Id. (emphasis added).

102 Id. at 25. Yvonne Olfers, deposed by plaintiff, testified that she recalled "that employees of the law school were alerted that Mr. Barnes was not to be on campus, and that if we did see him, that we were not to take any action, but were to - and I can't recall specifically if we were to notify campus police or Dean of Students. That's standard procedure." Docket no. 26, exhibit 14 at 7.

103 Id, at 30.

104 Id, at 46. Sergeant Chapa testified that he did not speak with Dean Johnson before or after the arrest, ill, and he did not recall that Dean Johnson was present in the Raba building at the time of the arrest, ill. at 29. Dean Hill testified that after he called Campus Police to meet him at the Raba building, he spoke briefly with Dean Johnson in person (docket no. 31, exhibit 25 at 23), but that Dean Johnson "never came to the Raba building and she was not there" when

2000 trespass warning that had been explained to plaintiff by Officer Simmons and signed by plaintiff, and plaintiff's violation of the trespass warning by his presence on campus. Plaintiff has offered no rebuttal evidence to show that the January 31, 2000 trespass warning was not listed as "active" in the records of the Campus Police or that Sergeant Chapa could not reasonably have known about the active trespass warning or reasonably relied upon that warning or his knowledge of it. In sum, the undisputed facts underlying the Sergeant Chapa's decision to arrest plaintiff support a reasonable belief by Sergeant Chapa that plaintiff was guilty of criminal trespass on May 25, 2000. Sergeant Chapa had reasonable grounds to conclude that plaintiff was trespassing and had probable cause to arrest plaintiff for criminal trespass on May 25, 2000.

With respect to plaintiff's arguments as to the reasonableness of his own belief that his suspension ended on May 20, 2000 and that his ban from campus ended with his suspension, even though his petition for readmission had not been approved such that it was reasonable for plaintiff to have concluded he could return to campus, as a threshold matter, it must be noted that the reasonableness of the officer's actions are at issue in determining probable cause to arrest, not the reasonableness of an arrestee's subjective beliefs. The reasonableness of plaintiff's understanding might have been a defense to the charge of criminal trespass, a reason why the charge was dismissed, or even an argument in mitigation of punishment had he been convicted of the May 25, 2000 trespass. But, there is no genuine issue of material fact that Sergeant Chapa's

plaintiff was arrested (Id. at 34). Dean Johnson also testified in her deposition that she recalled that she was not even on campus at the time of the arrest, docket no. 26, exhibit 17 at 7, 10. On the other hand, plaintiff recalls that Dean Johnson witnessed his arrest, told him it was not the case his ban from campus had expired, and got a copy of the May 20 letter to give to plaintiff. Docket no. 26, exhibit 18 at 71-74. It is not necessary for the Court to resolve this factual dispute about Dean Johnson's presence on May 25 in deciding the summary judgment since Sergeant Chapa testified that he based his decision to arrest only on the January 31, 2000 warning citation.

knowledge that the January 31, 2000 warning citation was "posted on our criminal trespass board" and "still active" was sufficient to allow a prudent person to conclude that plaintiff was criminally trespassing on May 25, 2000 and provided probable cause to arrest plaintiff on May 25, 2000 for criminal trespass. If plaintiff is arguing that a reasonable officer would not have arrested plaintiff on May 25, 2000 once plaintiff told the officer his suspension had ended, plaintiff's argument "rest[s] on a belief that no arrest should ever be made unless the officer has certain, rather than probable cause. . . ."105 But, police officers "are not required to be absolutely certain before making an arrest."I06 If plaintiff is arguing that a reasonable officer would not have chosen to arrest plaintiff, but would have given him another warning citation and escorted him off campus, plaintiff's opinion is "no more than a difference over a discretionary decision, without relevant legal consequences" as the opinion "has no probative value on the question of whether probable cause existed for this arrest."107

Plaintiff's advocacy about Dean Johnson's alleged malicious and intentional failure to mail her May 20, 2000 letter to plaintiff also appears to be immaterial to the resolution of whether or not Sergeant Chapa had probable cause to arrest plaintiff on May 25, 2000. Plaintiff argues "the arrest was procured upon the duplicitous and malicious manipulations of defendant Karen Johnson" whose "intentional failure" to mail the May 20 letter resulted in his arrest.108 Plaintiff, argumentatively, contended when questioning Dean Johnson at her deposition that "it

105 Bodzin, 768 F.2d at 725.
106 Id. at 726.
107 Id.
108 Docket no. 26 at 6-7.

was a setup" and "an ambush" for plaintiff to be arrested on May 25 for criminal trespass when the January 31, 2000 letter of suspension either stated or implied his ban from campus would end (with his suspension on May 20, 2000 and when plaintiff had not received the May 20, 2000 letter.109 But, Sergeant Chapa testified he "knew the criminal trespass warning was still active. It was posted on our criminal trespass board."110 Sergeant Chapa testified that he based his decision to arrest plaintiff on May 25, 2000 solely on the criminal trespass warning issued on January 31, 2000 that was still active.111 Further, Sergeant Chapa testified that he "had no knowledge that the [May 20] letter existed at the time of the arrest;" it would not have made a difference to his arrest decision if plaintiff had not (yet) received his copy of the May 20 letter; and he did not base his decision to arrest on the letter or it contents which informed plaintiff he was "still banned from the premises at St. Mary's University."112 Accordingly, even if, for the purposes of argument, Dean Johnson acted with the "duplicitous and malicious" intent in failing to timely mail the May 20 letter to plaintiff as plaintiff alleges, Sergeant Chapa made his arrest decision on the trespass warning that was active in the records of the Campus Police. The Court

109 Docket no. 26, exhibit 17 at 39-41. Plaintiff has also argued that defendant Dean Johnson never admitted mailing the May 20, 2000, citing to Dean Johnson's interrogatory answers in which she attests only that letters are typically routed through the St. Mary's mail system for mailing, but not that she personally delivers any mail to the United States Postal Service or one of its authorized depositories. Docket no. 26 at 8 and exhibit 12 at 2. Dean Johnson testified in her deposition that to her knowledge her May 20,2000 letter had been mailed to plaintiff. Docket no. 26, exhibit 17 at 12. For the purposes of addressing defendants' motion for summary judgment, the Court assumes, without deciding, the contested fact in favor of non-movant and assumes that the December 20, 2000 letter was not mailed to plaintiff.

110 Docket no. 30 at 3 and exhibit C. at 25.

111 Docket no. 30 at 3 and exhibit C at 30.

112 Docket no. 31, exhibit 24 at 30-33.

has determined that Sergeant Chapa's knowledge that there was an active trespass warning indicating plaintiff was not to return to campus provided him probable cause to arrest plaintiff for criminal trespass on May 25,2000. As in Bodzin, once the Court determines as a matter of law that an arrest was lawful, a § 1983 plaintiff suing for false arrest "cannot recover under § 1983 from any defendant."113

Further, the issue of Dean Johnson's intent in preparing, distributing, and causing to be mailed her May 20, 2000 is a contested issue of fact. But, for purposes of summary judgment, even it is true that Dean Johnson deliberately failed to mail or to cause to be mailed to plaintiff her May 20, 2000 letter, plaintiff has failed to demonstrate a genuine issue of material fact that Dean Johnson's alleged act or failure to act was the cause-in-fact of plaintiffs alleged damages. Because Sergeant Chapa testified that he based his decision to arrest and to press charges against plaintiff on May 25 solely on the active January 31, 2000 trespass warning, there is no genuine issue of material fact that Dean Johnson's alleged act or failure to act to insure the May 20 letter had been mailed to plaintiff did not playa "substantial part in bringing about or actually causing

113 Bodzin, 768 F.2d at 726. In Bodzin, plaintiff filed a § 1983 claim alleging unconstitutional arrest, use of excessive force, infringement of First Amendment rights and pendent state law claims for false arrest, malicious prosecution and slander against two arresting Dallas police officers, the City of Dallas, and the owner of the store whose manager called the police and asked the police to arrest plaintiff for criminal trespass. Id. at 724. At a jury trial, the Court directed a verdict for the City on all claims, for the store owner on all claims except unconstitutional arrest, and for the officers on all claims except unconstitutional arrest, use of excessive force, and common law false arrest. Id. The jury returned a verdict which, in sum, awarded plaintiff $10,000 against one officer upon a finding that the officer deprived plaintiff's right not to be deprived of liberty without due process and which found that the same officer and the store owner had false arrested or imprisoned plaintiff under state law but awarded no damages. Thereafter, the Court granted judgment for the officer notwithstanding the verdict. On appeal, the Court affirmed the decision to set aside the damages award against the officer and declined to set aside the decision to award no damages from the store owner.

the injury or damages."114 Stated differently, because Sergeant Chapa testified that he made his arrest decision solely on the January 31, 2000 warning citation, plaintiff has not raised a material factual dispute about whether "but for" plaintiff not receiving the May 20 letter, he would not have been arrested and criminal trespass charges would not have been filed. Although plaintiff has testified that he would not have returned to campus on May 25 had he received the May 20 letter, this evidence is not sufficient to raise a genuine issue of material fact as to whether a person using ordinary care in Dean Johnson's position would have foreseen that plaintiff would return to campus even though his application for readmission had not been approved.

With respect to the attendant false imprisonment claim, as in Bodzin, "[t]he lawfulness of the arrest is also a complete defense to [plaintiff's] state-law claims of false imprisonment. . . ."115 Further, the facts show that plaintiff was detained in connection with his arrest on May 25, 2000, until bond could be set and satisfied at approximately 3:00 a.m. on May 26, 2000. There is nothing in the summary judgment record that would allow the Court to conclude that the pretrial detention of plaintiff following his arrest for criminal trespass on May 25, 2000 was any greater intrusion or detention that what reasonably does occur in connection with an arrest. Plaintiff's response in opposition to summary judgment on this claim does not argue otherwise.116

In sum, there is no genuine issue of material fact or controverting evidence to raise a fact issue concerning whether any named defendant engaged in conduct that a reasonable person

114 Fifth Circuit Pattern Jury Instructions. Civil, § 10.1 (West, 2002).
115 Bodzin. 768 F.2d at 726 (citing to James v. Brown, 637 S.W.2d 914,918 (Tex. - 1982)).
116 Docket no. 26 at 9.

would realize violated plaintiff's right to be free of false arrest and false imprisonment in violation of § 1983 or that plaintiff's arrest and imprisonment was not supported by probable cause. Therefore, the portion of defendants' motion for summary judgment that requests entry of judgment as a matter of law on plaintiff's § 1983 claim based on false arrest and false imprisonment and plaintiff's pendent state law claims for false arrest and imprisonment should be granted.

Malicious Prosecution

Defendants have also moved for summary judgment on plaintiff's § 1983 claim based on malicious prosecution and pendent state law claim alleging malicious prosecution. In Texas, the elements of a cause of action for criminal prosecution require proof that: a criminal prosecution was commenced against plaintiff; defendant initiated or procured the prosecution; the prosecution was terminated in plaintiff's favor; plaintiff was innocent of the charge; defendant did not have probable cause for the proceedings; defendant acted with malice in filing the charge; and plaintiff suffered damages as a result of the prosecution.117 In the malicious prosecution context, there is a "presumption that the defendant had probable cause: "In short, the defendant's duty when reporting a crime to public officials is slight; the plaintiff's burden to show lack of probable cause is heavy."118 Defendants particularly argue that plaintiff cannot establish: he was innocent of the criminal trespass, defendants did not have probable cause for the proceedings;

117 Richey, 952 S. W .2d at 517 (citations omitted); see also Forbes, 3 S. W .3d at 898; Smith v. Sneed, 938 S.W.2d 181, 183 (Tex.App.-Austin, 1997) (citations omitted).
118 Forbes, 9 S.W.3d at 899.

and defendants acted with malice.119

As discussed, the contested summary judgment evidence shows that the defendant Sergeant Chapa had probable cause to arrest plaintiff for criminal trespass on May 25, 2000. That same showing of probable cause establishes that defendants had probable cause to initiate proceedings against plaintiff for criminal trespass on May 25, 2000. The facts known and reasonably believed by defendants would cause them to believe that plaintiff had been banned from campus and, accordingly, could be arrested and prosecuted for criminal trespass. As explained by Sergeant Chapa, Sergeant Chapa knew that St. Mary's "wanted to prosecute," even though he had no conversation with anyone on May 25, 2000 about prosecution, because "[t]he [January 31,2000] citation would not have been issued if that was not the case."120 Sergeant Chapa testified that the January 31,2000 trespass warning had been issued at Dean Johnson's request and he was "certain that a prosecution would follow the arrest" of plaintiff if he returned to campus.121 As in Bodzin, "[t]he lawfulness of the arrest is. . . a complete defense to [plaintiffs] state-law claims of. . . malicious prosecution."122

Again, plaintiff relies on his insistence that he had not received Dean Johnson's May 20, 2000 letter and asserts if he had he would not have returned to campus on May 25, 2000. Even if that is the case, it is uncontested that: plaintiff knew he had been suspended; plaintiff knew he

119 Docket no. 22 at 9.

120 Docket no. 30, exhibit C at 42.

121 Id. at 43.

122 Bodzin, 768 F.2d at 726 (citing Adcox v. Safeway Stores. Inc., 512 F. Supp. 452 (N.D. Tex. 1980); Lloyd v. Myers, 586 S.W.2d 222, 227 (Tex.Civ.App.-Waco 1979, writ re'd n.r.e.)).

had been banned from campus; plaintiff knew that he could reapply for admission in writing, but that he was required to submit documentation about "therapy and ongoing treatment" before his readmission would be considered; and plaintiff knew that his petition had not been accepted as of his May 17, 2000 telephone conversation with Dean Johnson. Again, plaintiff's arguments as to the reasonableness of his own belief that his ban from campus ended with his suspension may have been relevant to the decision of the Bexar County District Attorney's Office when moving to dismiss the criminal trespass proceedings, but does not raise a genuine issue of material fact about whether the criminal trespass proceedings lacked probable cause at the time they were commenced or at any other time.

Finally, plaintiff also focuses on the alleged intentional failure of Dean Johnson to mail plaintiff a copy of her May 20 letter. "It has been stated that the malicious-prosecution defendant lacks probable cause if he or she makes a material misrepresentation or does not disclose all known material facts in good faith to law enforcement officials."123 But, in Browning-Ferris Industries. Inc. and in Richey the Texas Supreme Court held that knowingly providing false information to a public officer or failing to fully and fairly disclose all material information to the prosecutor are relevant to the causation and malice elements of a malicious prosecution claim, but not the probable cause element.124 In this case, since Sergeant Chapa made the decision to

123 Richey, 952 S. W .2d at 519 (citations omitted). The majority of the Court in Richey concluded that this proposition was "derived mistakenly" from a court of appeals decision and did not correctly state Texas law. Id.
124 Browning-Ferris Indus.. Inc. v. Lieck, 881 S.W.288, 292-93 (Tex. 1994); Richey 952 S.W.2d at 519; Closs, 874 S.W.2d at 878; see also Forbes, 9 S.W.3d at 899 ("Even a failure to fully and fairly disclose all material information to the prosecutor will not defeat a complainant's probable cause, but are relevant to the issues of malice and causation in a malicious prosecution claim") (citing Richey, 952 S.W.2d at 519).

arrest plaintiff, not Dean Johnson, Dean Johnson's alleged failure to disclose plaintiff's non- receipt of the May 20 has "no bearing on probable cause."125 Even under plaintiff's version of the facts - that Dean Johnson was present at the Raba Building, saw plaintiff being arrested by Sergeant Chapa, told plaintiff about the May 20 letter and said she would get him a copy of the letter26 - there is no material evidence to show that Dean Johnson withheld from Sergeant Chapa or the state prosecutor (or, indeed, anyone other than, arguably, plaintiff) knowledge of the existence of the May 20 letter. Even under plaintiff's version of the facts, there is no evidence that Dean Johnson's alleged statements to Sergeant Chapa on May 25 were false or that Dean Johnson knew the statements were false when she made them.127 Further, under plaintiff's version of the facts, plaintiff told Sergeant Chapa his suspension and ban expired on May 20 and he had not received a copy of Dean Johnson's May 20 letter.128 Assuming this is true, "the complainant's failure to make a further investigation into the suspect's state of mind does not constitute probable cause if all *objective* elements of a crime reasonably appear to have been completed.,,129 Sergeant Chapa decided to arrest plaintiff and to file charges against plaintiff

125 Richey, .952 S.W.2d at 519. See Diamond Shamrock Com. v. Ortiz, 753 S.W.2d 238, (Tex.Civ.App.-Corpus Christi, 1988, writ denied) ("Appellee would like this Court to infer from the meager evidence presented that appellants had intentionally set him up to be arrested, and revealed only incriminating evidence to the police. . . Reasonable minds could not dispute the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the appellants' knowledge, that appellee was guilty of felony theft.") (citation omitted).

126 Docket no. 26, exhibit 18 at 71-74.

127 Browning-Ferris Indus.. Inc., 881 S.W.2d at 294. 128 Docket no. 26, exhibit 18 at 71- 72.

129 Forbes, 9 S.W.3d at 899 (citing Richey, 899 S.W.2d at 518) (emphasis in original).

based on the objective elements of the criminal trespass charge and the objective, and uncontested fact, that the January 31,2000 warning citation was known to Sergeant Chapa to be "active" and was still "active" in the records of the Campus Police. As a matter of law, Sergeant Chapa had probable cause to initiate criminal proceedings against plaintiff on May 25.

In sum, there is no genuine issue of material fact or controverting evidence to raise a fact issue concerning whether any named defendant engaged in conduct that a reasonable person would realize violated plaintiff s right to be free from malicious prosecution in violation of § 1983 or that plaintiff's arrest and prosecution was not supported by probable cause. Therefore, the portion of defendants' motion for summary judgment that requests entry of judgment as a matter of law on plaintiff's§ 1983 claim based on malicious prosecution and pendent state law claim for malicious prosecution should be granted.

C. SERGEANT CHAPA'S QUALIFIED IMMUNITY

Alternatively, defendant Sergeant Chapa argues that he is entitled to qualified immunity for his action in arresting plaintiff for the reason that a reasonable person could have believed the arrest was lawful in light of clearly established law.13O Plaintiff's response argues that "Karen Johnson's knowledge of the facts as well as her actual malice in this circumstance are sufficient to deny any of these actors the safe harbor of qualified immunity."131

Qualified immunity extends to government officials performing discretionary functions in

130 Docket no. 22 at 12. The Court notes that the caption of this argument in defendants' brief is: "Defendants are entitled to summary judgment because of qualified immunity," but the argument set out in the text below the caption addresses only that "Officer Chapa is entitled to qualified immunity" (Id.). Accordingly, this report addresses Sergeant Chapa's qualified immunity.

131 Docket no. 26 at 10.

their individual capacities "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."132 Determination of qualified immunity claims requires a two-step analysis: whether plaintiff has made a sufficient showing that the official defendant violated a clearly established constitutional right and, if so, whether the official's actions were objectively reasonable in light of the clearly established right. 133

> In suits alleging illegal arrest, the qualified immunity determination turns on whether a reasonable officer could have believed the arrest to be lawful, in light of clearly established law and the information the officer possessed. . . Even law enforcement officials who reasonably, but mistakenly, conclude that probable cause is present are entitled to immunity. . . The qualified immunity defense "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'",134

Plaintiff does not argue or point to specific summary judgment that would show that Sergeant Chapa's conduct in arresting plaintiff for criminal trespass on May 25, 2000 violated any of plaintiff's clearly established constitutional rights or that Sergeant Chapa's conduct was not objectively reasonable. "[T]he Constitution does not guarantee that only the guilty will be arrested. If it did, Section 1983 would provide a cause of action for every defendant

132 Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S,Ct. 2727 (1982); Campbell v. Jones, 264 S.W.2d425, 427 (Tex, 1954); Dent v. City of Dallas, 729 S.W.2d 114,117 (Tex.App.- Dallas) 1986, writ ref'd n.r.e.), cert. denied, 485 U.S. 977, 108 S.Ct. 1272 (1988); Closs, 874 S. W .2d at 876. See also Whirl 407 F.2d at 790 ("'We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983,' Pierson v. Ray supra, 386 U.S. at 556,87 S.Ct. at 1219, 18 L.Ed.2d at 296.").

133 Siegert v. Gilley, 500 U.S. 226,233-34111 S.Ct. 1789 (1991); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982); Nerren v. Livingston Police De12t., 86 F.3d 469,473 (5th Cir. 1996). See also Fifth Circuit Pattern Jury Instructions, Civil, § 10.1.

134 Lang, 942 S.W.2d at 763 (citations omitted).

acquitted."[135]

Under the totality of circumstances at the time of plaintiff's arrest, Sergeant Chapa reasonably could have believed that he had probable cause to arrest plaintiff for criminal trespass, that such an arrest was lawful, and that pressing such a charge was lawful. Accordingly, for the same reasons that the Court concluded that Sergeant Chapa had probable cause to arrest plaintiff for criminal trespass on May 25, 2000 and probable cause to initiate prosecution for criminal trespass, the Court concludes that there is no genuine issue of material fact that Sergeant Chapa is qualifiedly immune for his decision to arrest plaintiff on May 25, 2000 and cause criminal trespass charges to be brought against plaintiff. Plaintiff has presented no evidence to show that Sergeant Chapa did not act in good faith and within the scope of his law enforcement duties.

In sum, the portion of defendants' motion for summary judgment that requests entry of judgment on plaintiff's claims against Sergeant Chapa based on Sergeant Chapa's qualified immunity should be granted.

D. PLAINTIFF'S CLAIMS AGAINST DEFENDANTS DEAN HILL AND SERGEANT CHAPA AND THE STATUTE OF LIMITATIONS

Plaintiff filed his original complaint in this case on March 13, 2002 and his first amended complaint, which added Dean Hill and Sergeant Chapa as defendants, on August 29, 2002. Defendants Dean Hill and Sergeant Chapa alternatively moved for summary judgment on plaintiff's § 1983 claim and pendent state law claims for false arrest, false imprisonment and malicious prosecution on the ground that they are time-barred. Plaintiff's response argues that his claims against Dean Hill and Sergeant Chapa "relate back" to the March 13,2002 filing of

135 Id. (quoting Baker v. McCollan, 443 U.S. 137, 145, 99 S.Ct. 2689,2695 (1979)).

the original complaint. Defendants filed no reply to address this argument nor does their supplemental motion address the issue.

The parties agree that state law supplies the limitations period for § 1983 claims.136 The statute of limitations for a § 1983 civil rights action brought in Texas is two years.137 Federal law determines when a § 1983 claim accrues.138 A civil rights cause of action accrues when a plaintiff knows or has reason to know of the injury that is the basis for his complaint and the "statute of limitations begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured."139

The parties agree that under Texas law a two-year limitations period applies to claims of false arrest and false imprisonment.140 The parties also agree that a claim for false arrest or false imprisonment accrues upon a plaintiff's release from imprisonment.141 The parties also appear agree that plaintiff was arrested May 25, 2000 and was released from detention on May 26, 2000,

136 Board of Regents v. Tomanio, 446 V.S. 478, 483-86,100 S.Ct. 1790, 1794 (1980); Helton v. Clements, 832 F.2d 332,334-35 (5th Cir. 1987).

137 E.g. Moore v. McDonald, 30 F.3d 616,620 (5th Cir. 1994) (for § 1983 action, court looks to forum state's personal injury limitations period); Helton, 832 F.2d at 334 ("Civil rights actions brought under 42 V.S.C. §§ 1981, 1983, 1985, and 1988 are deemed analogous to Texas tort actions, and therefore, the applicable limitations period is the two years fixed by Article 5526 of the Vernon's Texas Annotated Statutes, now recodified as TEx.CIV .PRAC. & REM.CODE ANN. § 16.003 (Vernon 1986).") (citations omitted).

138 Helton, 832 F.2d at 334. See docket no. 26 at 11 ("For our purposes, the accrual of Barnes' § 1983 claim was the date of his awareness of the claim - May 25, 2000.").

139 Helton, 832 F.2d at 334 (citations omitted); see also Moore, 30 F.3d at 620;

140 TEX.CIV. PRAC.& REM. CODE § 16.003(a).

141 Docket no. 22 at 13; docket no. 26 at 10. See Adler v. Beverly Hills Hosp., 594 S.W.2d 153, 156 (Tex.Civ.App.-Dallas,1980).

such that plaintiff's time to file a false arrest and false imprisonment claim began to run no later than May 27, 2000.142

The parties also agree that Texas law provides for a one-year period of limitations for malicious prosecution actions.143 The parties agree that a claim for malicious prosecution accrues once the underlying prosecution is resolved in favor of plaintiff. 144 Finally, the parties agree that the County Court Judge entered an Order dismissing plaintiff's state prosecution for malicious prosecution on March 15, 2001.145

Accordingly, plaintiff's § 1983 claim based on allegations of false arrest and false imprisonment and pendent state law claims alleging false arrest and false imprisonment included in the original complaint filed March 13, 2002 are timely filed, but those claims asserted against Dean Hill and Sergeant Chapa, added by the first amended complaint filed August 29, 2002, are not timely filed unless they are deemed to "relate back" to the date of filing of the original complaint. Similarly, plaintiff's § 1983 claim based on an allegation of malicious prosecution and pendent state law claim for malicious prosecution included in the original complaint are timely filed, but that claim asserted against Dean Hill and Sergeant Chapa, added by the first amended complaint, are not timely unless they is deemed to "relate back" to the date of the filing

142 Id.

143 Id.; see also TEX.CIV .PRAC. & REM. CODE § 16.002(a); Lang 942 S. W .2d at 757-58; Patrick v. Howard, 904 S.W.2d 941,943 (Tex.Civ.App.-Austin, 1995).

144 Docket no. 22 at 13-14; docket no. 26 at 10-11.

145 Id.

of the original complaint.146

Federal Rule of Civil Procedure 15(c)(2) provides that an amendment of a pleading relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Federal Rule of Civil Procedure 15(c)(3) provides that if the requirements of Rule 15(c)(2) have been satisfied and if the amendment changes the party against whom a claim is asserted and

> within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

In plaintiff's response to defendant's motion, plaintiff argues that all of the claims against Dean Hill and Sergeant Chapa "relate back to the March 13, 2002 filing of Bames' original complaint in this court."147 Plaintiff does not cite to Rule 15 or expressly refer to either Rule 15(c)(2) or (c)(3), but does cite to Jacobsen v. Osborne,148 a Fifth Circuit decision addressing Rule 15(c)(3).149 In Jacobsen, plaintiff brought a § 1983 action against a named police officer, Officer Osborne, and an unnamed deputy identified as "John Doe" claiming false arrest and

146 With respect to plaintiff's § 1983 claims against Dean Hill and Sergeant Chapa, plaintiff does not argue that he was not aware of the injury giving rise to his claims against Dean Hill or Sergeant Chapa until sometime after the filing of the original complaint or that he was not aware of the roles Dean Hill and Sergeant Chapa allegedly played in connection with his arrest on May 25,2000 until sometime after the filing of the original complaint.

147 Docket no. 26 at 11.

148 133 F.3d 315 (5th Cir. 1998).

149 Docket no. 26 at 11.

related claims. After the statute of limitations and the deadline for amending pleadings had expired, plaintiff moved to amend to add as defendants the actual arresting officers and deputies whose identities he had learned through discovery. The Court denied leave to amend and, thereafter, entered judgment for defendants. The Court of Appeals held that there was sufficient identity of interest between Officer Osborne and the newly named officers, and the City to infer notice to the newly named officers at the time of service on Officer Osborne. Particularly, the Court noted that "[t]he City Attorney answered the complaint on behalf of the City and Officer Osborne and, to do so, presumably investigated the allegations" which provided notice of the action to the newly named officers and established that the newly named officers "'knew or should have known' that but for [plaintiff's] mistaken belief that Officer Osborne was the arresting officer, the action would have been brought against them."150 Accordingly, the Court found that the criteria of Rule (c)(2)and (3) were satisfied and the trial court should have allowed plaintiff to amend his complaint to add claims against the police officers who actually had arrested plaintiff.151 On the other hand, the Court agreed that the motion to amend to add the newly named deputies for the "John Doe" defendant was proper because there was no mistake concerning the identity of the proper party, as required by Rule 15(c)(3), and, therefore, the claims in the amended complaint did not relate back.152

In this case, plaintiff's first amended complaint adds two new defendants. Accordingly, under the very terms of the rule, the prerequisites set forth in Rule 15(c)(3) also must be satisfied.

150 133 F.3d at 320.
151 Id. at 320-21.
152 Id. at 321.

The claims asserted in the amended complaint against Dean Hill and Sergeant Chapa arise out of the "conduct, transaction or occurrence set forth" in the original complaint such that Rule 15(c)(2) has been satisfied. But, just as in reference to the deputies added in Jacobsen, there is no basis to conclude that any "mistake" was made concerning the identity of any proper party or that Dean Hill and Sergeant Chapa are chargeable with knowledge of the mistake.153 Accordingly, Rule 15(c)(3)(B) has not been satisfied.

In sum, the portion of defendants' motion for summary judgment that requests entry of judgment on each of plaintiff's claims against Dean Hill and Sergeant Chapa on the ground they are barred by the statute of limitations should be granted.

VII. RECOMMENDATION

The Court recommends that defendants' motion for summary judgment154 and

153 King v. One Unknown Fed. Corr. Officer, 201 F.3d 910,914 (7th Cir. 2000) ("We have interpreted 15(c)(3) to permit an amendment to relate back t the original complaint only where 'there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake.' Moreover, we have emphasized that the mistake requirement is independent from whether the purported substitute party knew that action would be brought against him."); Soto v. Brooklyn Corr. Facility 80 F.3d 34,36 (2d Cir. 1996) ("[A]n amended complaint adding individual defendants [does] not relate back where the plaintiff ha[s] shown neither factual mistake. . . nor legal mistake. . . .").

Because the Court cannot find mistake, there is no need to address whether Dean Hill and Sergeant Chapa "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." Plaintiff asked Sergeant Chapa at his deposition when he "first knew you were involved with the suit" and Sergeant Chapa testified it was when he was served with papers. Docket no.30, exhibit C at 8, 10. Dean Hill testified that, to the best of his recollection, he first learned of the lawsuit in the fall of 2002, after September 4, 2002, when Dean Hill was in Great Britain and had a telephone conversation with Dean Johnson who told him he had been named individually. Docket no. 31, exhibit 25 at 8-11. The record reflects that all defendants share the same attorney.

154 Docket no. 22.

supplemental motion for summary judgmenf55 GRANTED; plaintiff's claims against each defendant should be DISMISSED; each side should bear its own costs. Any relief not expressly granted should be DENIED.

VIII. INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on each and every party either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. According to Title 28 U.S.C. § 636(b)(1) and Rule 72(b), FED. R. CIV. P., any party who desires to object to this report must serve and file written objections to the Report and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court, and serve the objections on all other parties and the Magistrate Judge. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the District Court.156 Additionally, any failure to file written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error,

155 Docket no. 30.

156 See Thomas v. Am, 474 U.S. 140,150,106 S.Ct. 466,472 (1985).

from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.157

SIGNED and ENTERED this 7 day of April, 2003.

/S/
Pamela A. Mathy
United States Magistrate Judge

157 Acuna v. Brown & Root Inc., 200 F.3d 335,340 (5th Cir. 2000); Douglass v. United Services Auto. Ass'n., 79 F.3d 1415, 1428 (5th Cir.1996).

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL R. BARNES,	§	FILED
Plaintiff,	§	AUG 07 2003
VS.	§	CLERK US DISTRICT
KAREN JOHNSON,	§	COURT EASTERN
Individually and as	§	DISTRICT OF TEXAS
Dean of Students; ST.	§	
MARY'S UNIVERSITY, a	§	CIVIL ACTION NO.
private religious, educational	§	SA-02-CA-0247-FB
corporation organized under	§	
the laws of Texas;	§	
ANDREW§ HILL, Individually	§	
and as Assistant Dean of	§	
Students; and PAUL CHAPA,	§	
Sergeant in the Campus Police,	§	
Defendants.	§	

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has considered the Report and Recommendation of the United States Magistrate Judge filed in the above styled and numbered cause on April 7, 2003 (docket #32), and Plaintiffs Objections filed April 21, 2003 (docket # 34). Defendants have not filed a response or any objections to the Report and Recommendation.

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of them. See 28 U .S.C. § 636(b)(l) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether they are either clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219,1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989).

On the other hand, any Report or Recommendation to which there are objections requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. Battle v. United States Parole Commission, 834 F.2d 419,421 (5th Cir. 1987).

In his first objection, plaintiff addresses a factual inaccuracy which he claims occurs at footnote 51 of the Report and Recommendation. Plaintiff claims the Report states the reason he failed to disclose a previous arrest on his original law school admissions application was having to do with the arrest being within ten years of the date of the application. Plaintiff refers to his deposition and his statement that he did not disclose the arrest because he received deferred adjudication. In reviewing the footnote, the Court does not find that the Report stated the reason the plaintiff answered the question in the negative. The footnote simply points out plaintiff acknowledged that he had not truthfully answered question 14(a) on his original application for admission because he, in fact, had been arrested within ten years of the date of his application. The objection is therefore overruled. Plaintiff also takes issue with the conclusion by the Magistrate Judge that probable cause existed for Officer Chapa to arrest the plaintiff for criminal trespass. Plaintiff seems to argue that in assessing probable cause, the Court must look at what all of the defendants in this case knew not just what the arresting officer knew. However, plaintiff has not offered any authority in support of his assertion, and the Magistrate Judge has provided legal authority for her conclusion that it is the facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information that must be reviewed in determining whether probable cause existed. Plaintiff s objection as to the probable cause finding as to Officer Chapa is also overruled.

The Court has reviewed all the objections to the Report and Recommendation and has conducted a de novo review of the Magistrate Judge's Report and Recommendation. Based on the Report, the Court finds all the objections to the Magistrate Judge's Recommendation are without merit. This Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Report and Recommendation issued April 7, 2003.

Accordingly, the Report and Recommendation of the United States Magistrate Judge shall be accepted pursuant to 28 U. S. C. § 636(b)(1) such that defendants' motion for summary judgment and supplemental motion for summary judgment should be GRANTED, plaintiff s claims against each defendant should be DISMISSED, and each side should bear its own costs.

Accordingly, it is hereby ORDERED that the Recommendation of the United States Magistrate Judge, filed in this case on April 7, 2003 (docket #32), is ACCEPTED such that defendants' motion for summary judgment (docket #22) and defendants' supplemental motion for summary judgment (docket #30) are GRANTED and plaintiff s claims against each defendant are DISMISSED. It is further ORDERED that each side should bear its own costs. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 7th day of August, 2003.

/S/

FRED BIERY

UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL L. BARNES,	§	FILED
Plaintiff,	§	AUG 07 2003
VS.	§	CLERK US DISTRICT
KAREN JOHNSON,	§	COURT EASTERN
Individually and as	§	DISTRICT OF TEXAS
Dean of Students; ST.	§	
MARY'S UNIVERSITY, a	§	CIVIL ACTION NO.
private religious, educational	§	SA-02-CA-0247-FB
corporation organized under	§	
the laws of Texas;	§	
ANDREW HILL, Individually	§	
and as Assistant Dean of	§	
Students; and PAUL CHAPA,	§	
Sergeant in the Campus Police,	§	
Defendants.	§	

JUDGMENT

The Court considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the Order Accepting Report and Recommendation of the United States Magistrate Judge filed in this cause on this same date,

It is hereby ORDERED, ADJUDGED and DECREED that the Report and Recommendation of the United States Magistrate Judge, filed in this case on April 7, 2003 (docket #32) is ACCEPTED such that defendants' motion and supplemental motion for summary judgment (docket #s 22 and 30) are GRANTED, plaintiffs case against each defendant is DISMISSED, and each side shall bear its own costs. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 7th day of August, 2003.

/S/

FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 03-51012
SUMMARY CALENDAR

MICHAEL L. BARNES,
Plaintiff-Appellant
VS.
KAREN JOHNSON, Individually and as Dean of Students; ST. MARY'S UNIVERSITY, a private religious, educational corporation organized under the laws of Texas; ANDREW HILL, Individually and as Assistant Dean of Students; and PAUL CHAPA, Sergeant in the Campus Police,
Defendants-Appellees

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
FILED
May 20, 2004
Charles R. Fulbruge III
Clerk

On Appeal from the United States District Court for the Western District of Texas
(SA-02-CV-247)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DeMOSS, Circuit Judges. REYNALDO G. GARZA, Circuit Judge:1

In this appeal, we review the district court's decision granting Defendants - Appellees'

1pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

motion for summary judgement and supplemental motion for summary judgement on Plaintiff - Appellant, Michael Barnes', civil rights action filed under 42 U.S.C. § 1983 and Texas state law in which he alleges false arrest, false imprisonment, and malicious prosecution.

In December of 1999, Barnes was suspended from St. Mary's University School of Law for violations of the student code of conduct. Barnes had been accused of and had admitted to stalking at least two female law students.

On May 25, 2000, Barnes came to campus and attempted to register for the upcoming summer session of classes. Barnes was arrested for criminal trespass by a St. Mary's University campus police officer, Defendant - Appellee, Officer Paul Chapa. The officer turned Barnes over to the San Antonio police, who later transferred Barnes to the Bexar County Sheriff's Department, where Barnes was charged with criminal trespass. by the district attorney's office.

On March 13,2002, Barnes filed this suit against St. Mary's University and the named defendants. Upon the motion of Defendants - Appellees, the district court granted summary judgment and dismissed the action. Barnes timely appealed.

We review the grant of a motion for summary judgment de novo. *Melton* v. *Teachers Ins. & Annuity Ass'n of America,* 114 F 3d 557, 559 (5th Cir. 1997). Summary judgment is appropriate when there are no genuine issues of material fact. FED. R. CN. P. 56(c); *Melton, 114 F3d at 559; Galindo* v. *Precison Am. Corp.,* 754 F.2d 1212, 1216 (5th Cir. 1985).

Barnes has failed to show that the district court erred in granting summary judgment. *See Melton,* 114 F 3d at 559. Barnes' conclusory allegations of malice are insufficient to create an issue of fact. *Little* v. *LiquidAir Corp.,* 37 F3d 1069, 1075 (5th Cir. 1994).

After reviewing the record, we hold that there was probable cause for Barnes' arrest and prosecution. *See Piazza* v. *Mayne,* 217 F.3d 239,246 (5th Cir. 2000); *Bodzin* v. *City of Dallas,* 768 F.2d 722,724-26 (5th Cir. 1985). Therefore, Barnes' claims lack merit under both federal and state law. *See Castellano* v. *Fragozo,* 352 F.3d 939,945 (5th Cir. 2003).

Barnes also failed to show that the district court erred in holding that Defendant -I Appellee, Officer Paul Chapa, was entitled to qualified immunity. *See Jacobsen* v. *Osborne,* 133 F.3d315,320-22(5thCir.1998).

For the foregoing reasons, we uphold the district court's decision. AFFIRMED.

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 03-51012

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT
FILED
JUNE 17, 2004
Charles R. Fulbruge III
Clerk

MICHAEL L. BARNES
Plaintiff-Appellant

v.

KAREN JOHNSON, Individually and as Dean of Students, St. Mary's University; ST MARY'S UNIVERSITY, a private religious, educational corporation organized under the laws of Texas; ANDREW HILL, PAUL CHAPA,
Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is (DENIED).

ENTERED FOR THE COURT.

/S/ Reynaldo G. Garza
United States Circuit Judge

CLERK'S NOTE
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF THE
MANDATE

APPENDIX 6

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-51012
Summary Calendar
D.C. Docket No. SA-02-CV-247

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT
FILED
JUNE 29, 2004
Charles R. Fulbruge III
Clerk

MICHAEL L. BARNES
Plaintiff-Appellant

v.

KAREN JOHNSON, Individually and as Dean of Students, St. Mary's University; ST MARY'S UNIVERSITY, a private religious, educational corporation organized under the laws of Texas; ANDREW HILL, PAUL CHAPA,
Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio

Before REYNALDO G. GARZA, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUN 25, 2004

A true copy Test Clerk US Court of Appeals, Fifth Circuit By /S/
June 25, 2004
New Orleans, Louisiana

APPENDIX 7

ST MARYS UNIVERSITY

November 10, 1999

Michael Barnes

4210 Fredericksburg Road #303

San Antonio, Texas 78202

Regarding Incident Number: 21325091299

Dear Michel:

This letter is to verify the findings of the hearing held in your absence on November 09, 1999. Based on the information gathered, the following decision was made:

Violation	Article	Point	Page	Violation
Abuse, Threats, Harrasment, Etc.	II	B	26	No
Failure to Comply	II	F	26	Yes
Conduct which is inconsistent with the Christian goal	II	S	27	Yes

As a result of these findings, you have been assigned the following sanctions:

Probation: Effective immediately and to remain in effect until December 20, 1999. Please be aware that more severe disciplinary action shall occur should you be found in further violations during this period. Deadline date is December 20, 1999.

Behavioral: Assessment is to be done by the Counseling and Testing Center. Appointment must be made by November 19, 1999. Failure to keep your appointment will result in further disciplinary action. You must sign a release giving the counselor permission to discuss your case with Karen Johnson, Dean of Students. Yom continuing status as a student will be decided based on this assessment. Deadline Date is November 19, 1999.

Discretionary Sanction: You are to continue to have no contact with Laurel Engelmann.

Suspension: You are to be placed on suspension beginning December 21, 1999 and until May 20, 2000. Suspension means that one is to be separated from St. Mary's University for a definite period of time, after which the student is

eligible to petition for return. During the period of suspension the student is banned for the premises of St. Mary's University. Deadline Date is May 20, 2000.

You have the right to appeal this decision. Appeals must be submitted, in writing, to the Dean of Students in the Student Life Office within five (5) school days of delivery of this letter to you. (It is in your best interest to keep a copy of the appeal letter for yourself.) Delivery is considered to have been made when this letter has been given to you or mailed to you through certified mail, return receipt requested. Please refer to the Code of Conduct, page 38, in the Student Handbook for complete details on the appeals procedure.

If you have any questions regarding this letter, the sanctions, or the process, please contact my office.

Sincerely,

/S/

Karen D. Johnson
Dean of Students

STUDENT LIFE OFFICE
ONE CAMINO SANTA MARIA
SAN ANTONIO. TEXAS 78228-8583
(210) 436-3714
FAX: (210) 436-3300

APPENDIX 8

ST. MARY'S UNIVERSITY POLICE DEPARTMENT

CITATION

99- 3591

DATE (MO DAY YR)	HRS. (TIME)	PERMIT #	EXPIRES (MO DAY YR)
01/31/99	1405		

NAME LAST	FIRST	MIDDLE
Barnes	Michael	

ADDRESS	CITY/ST	ZIP
4210 Fredericksburg #B303	San Antonio, Tx	78201

DRIVERS LICENSE #	STATE	YEAR/DOB/AGE	STMU I.D. #
10825659	Tx	1-30-1954	213254

MAKE	MODEL/YR	COLOR

LICENSE PLATE	STATE	TAG MO/YR	BODY

LOCATION: St Mary's University

DID COMMIT THE FOLLOWING OFFENSE. INDICATE ONLY ONE OFFENSE PER CITATION

PARKING VIOLATION	MOVING VIOLATION
1001 NO PERMIT DISPLAYED	3010 SPEEDING
1002 EXPIRED PERMIT	3011 FAILURE TO STOP AT STOP SIGN
1003 PERMIT NOT VALID FOR LOT	3012 FAILURE TO YIELD RIGHT-OF-WAY
1004 PARKED WHERE PROHIBITED BY SIGNS/MARKINGS	3013 NO DRIVERS LICENSE
1005 PARKED IN NO PARKING SPACE/AREA	3014 OTHER
1006 PARKED IN RESERVED 24 SPACE/AREA	**CRIMINAL VIOLATION**
1007 PARKED IN HANDICAPPED SPACE	5015 CRIMINAL TRESPASSING
1008 WARNING	5016 ALCOHOL VIOLATION
1009 OTHER	

OTHER COMMENTS PERTAINING TO THIS OFFENSE:

Warning

IN VIOLATION OF: ☐ PARKING REGULATION ☐ STATE STATUTE

SECTION: SUB-SECTION:

I UNDERSTAND MY SIGNATURE IS NOT AN ADMISSION OF GUILT OR WAIVE OF RIGHTS.

SIGNATURE OF DEFENDANT: Michael L. Barnes

SIGNATURE OF OFFICER: BADGE #: 411 I.D. #

BEST AVAILABLE COPY

APPENDIX 9

ST MARY'S UNIVERSITY

May 20, 2000 .

Mr. Michael L. Barnes
3612 Ocee
Houston, TX 77063

Dear Mr. Barnes:

This is in response to your telephone call of May 17, 2000 regarding your request for readmission to St. Mary's University beginning with the 2000 summer term.

Based on the terms of your suspension and our conversation of May 17, 2000 your request for readmission is not accepted. Please note that you are still banned from the premises of St. Mary's University.

Please contact me if you have any questions regarding this decision.

Sincerely,
/S/
Karen D. Johnson
Dean of Students

cc: Dr. Charles Cotrell, President
Katherine M. Sisoian, Vice President for Student Development
William Piatt, Dean, School of Law
Victoria Mather, Associate Dean, School of Law
Dr. Barbara Hardin, Director of Counseling and Testing
Dr. Debbie Huerta, Staff Psychologist
Stephen Ramirez, Director, University Police

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